SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. a] [Caption omitted]

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 1044 Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHAMPLIN REFINING COMPANY, a Corporation; and CHAMPLIN REFINING Co., a Corporation, Defendants

STATE OF OKLAHOMA ex rel. COMMISSIONERS OF THE LAND OFFICE, Interveners

COMPLAINT—Filed July 13, 1943

Comes now the plaintiff, United States of America by Whit Y. Mauzy, United States Attorney, for the Northern District of Oklahoma, acting at the request of the Secretary of the Interior and by direction of the Attorney General of the United States and brings this action against the defendants above named, and for its cause of action against said defendants, alleges and states:

I

That the Champlin Refining Company is and was at the times hereinafter mentioned a foreign corporation, organized and existing in the State of Iowa, and operating pursuant to the laws of that state and duly licensed to operate in the State of Oklahoma with its principal place of business in Enid, Garfield County, Oklahoma.

That the Champlin Refining Co., is and was at all times hereinafter mentioned a foreign corporation, organized and existing in the State of New Mexico and operating pursuant to the laws of that state and licensed to operate in the State of Oklahoma with its principal place of business, in Enid, Garfield County, Oklahoma.

[fol. 2] II

That pursuant to certain treaties between the Cherokee Nation and the United States of America and pursuant to the authority granted by the Act of March 3rd, 1883 (22 Stat. L. 603-624), the Cherokee Nation for a valuable consideration by its duly authorized officials on the 14th day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Pawnee Tribe of Indians,

Townships 21, 22 and fractional Townships 23 and 24, North of Range 4 East of the Indian Meridian,

together with other lands not herein involved.

III

That pursuant to certain treaties between the Cherokee Nation and the United States of America, whereby certain lands were ceded to the United States by the Cherokee Nation for the Settlement of friendly Indians, the Secretary of the Interior on the 25th day of June 1881, designated and assigned for the use and occupation of the Confederated Otoe and Missouria Tribe of Indians,

that portion of Township 23, North of Range 3 East of the Indian Meridian, lying West of the Arkansas River,

together with other lands not herein involved.

IV

Pursuant to certain treaties between the Cherokee Nation and the United States of America and pursuant to the authority granted by the Act of March 3, 1883 (22 Stat. L. 603-624) the Cherokee Nation for a valuable consideration by its duly authorized officials on the 14th day of June, 1883 did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Otoe and Missouria Indians.

fractional Township 23, North of Range 3 East of the Indian Meridian,

[fol. 3] together with other lands not involved herein.

V

That by virtue of the Act of Congress of April 10, 1876 (19 Stat. L. 29) there was set apart for the use and occupation of the Pawnee Indians

Township 23, North of Range 4 East of the Indian Meridian, together with other lands and the provision made for the Secretary of the Interior to cause to be made to each head of a family or single person over twenty-one years of age belonging to said Pawnee Tribe of Indians and residing upon said reservation, who should so elect, an allotment within said reservation consisting of one hundred and sixty acres of land, and that the Certificates of allotment were to be issued by the Commissioner of Indian Affairs upon the approval of the Secretary of the Interior with the provision that patents were to be issued upon the allottee making certain improvements.

VI

That the Act of Congress of February 8, 1887 (24 Stat. L. 388) provided that whenever, in the opinion of the President of the United States, it was advantageous to the *Indian* for their reservation to be used for agricultural or grazing purposes, he could cause the same to be surveyed and make allotments in severalty to such Indians. Said Act further provided that upon the allotments being approved by the Secretary of the Interior patents were to issue in the name of the allottees, but were to provide that the United States hold the land allotted for a period of twenty-five years in trust for the sole use and benefit of the Indian to whom the allotment was made, or in case of his death to his heirs, and at the expiration of said period, the United States was to convey said land by patent to said Indian so discharged of the trust and free of all incumbrances. Said Act further provided that the President could, in his discretion, extend the trust period.

VII

That under and by virtue of the authority granted in Section 5 of the Act of February 8, 1887 (24 Stat. L. 388) [fol. 4] by executive orders of the different Presidents, the trust provisions have been extended to all lands allotted and as to all allottees and their heirs hereinafter referred to and involved herein. That all lands hereinafter described are and have been allotted to the respective allottees in the

manner as provided by law and are at this time and have been since the allotments were made, held in trust by the United States of America for the sole use and benefit of the respective allottees and the heirs of the deceased allottees.

VIII

That on the 9th day of October, 1893 a trust patent was issued as provided by law to Horace Fields, an Indian of the Pawnee Tribe, being allottee No. 28, to the following described real estate, to-wit:

The Southeast Quarter of the Northwest Quarter and the Lots numbered one, two and three of Section Nineteen, in Township Twenty-three, North of Range Four East of the Indian Meridian, in Oklahoma Territory containing one hundred twenty-one acres and sixty-six hundredths of an acre.

That thereafter the allottee, Horace Fields died, his heirs being determined by the Department of the Interior and found to be his wife, Eva R. Weeks and his son, Arthur Fields, each of whom took a one-half interest in and to said allotment. That thereafter by deed duly approved by the Department of the Interior on June 13th, 1922, Eva R. Weeks, conveyed a one-fourth interest in the allotment of Horace Fields to Arthur Fields. That Eva R. Weeks thereafter died leaving as her heirs as found and determined to be so by the Department of the Interior,

Anna Barker, Johnie Davis, Lena Brown, and Arthur Fields,

each of whom received a one-fourth interest in the estate of Eva R. Weeks. That the title to the real estate above described is now held in trust and was so held on the 20th day of July, 1942, and prior thereto by the United States of America for the following heirs, in the proportionate interests set opposite their names, as follows:

[fol. 5]

Arthur Fields	13/16ths
Anna Barker	1/16th
Jennie Davis	1/16th
Lena Brown	1/16th

IX

That on the 9th day of October, 1893, a trust patent was issued as provided by law to William Bayhylle, an Indian of the Pawnee Tribe, being allottee No. 302, to the following described real estate, to-wit:

The West Half of the Northeast Quarter of Section Twenty, and the Southwest Quarter of the Southeast Quarter, and Lot numbered Six of Section Seventeen, in Township Twenty-three, North of Range Four East of the Indian Meridian, Oklahoma Territory, containing one hundred twenty-nine acres.

That the said William Bayhylle died on or about the 26th day of April, 1911, leaving as heirs, who were determined and found by the Department of the Interior to be and their interests as follows:

Kittie Bayhylle, wife	7/21sts,
Edward Bayhylle, son	2/21sts,
Daniel Bayhylle, son	2/21sts,
Elijah Bayhylle, son	2/21sts,
Violet Rappuis, daughter	2/21sts,
William Bayhylle, Jr., son	2/21sts,
Louis Bayhylle, son	2/21sts,
Elmer Bayhylle, son	2/21sts.

That thereafter Elijah Bayhylle died and it was determined and found by the Department of the Interior that his mother, Kittie Bayhylle, was his sole and only heir, whereupon she took the entire estate of Elijah Bayhylle. That thereafter, on or about the 18th day of August, 1940, Kittie Bayhylle died, her heirs being determined by the Department of the Interior and found to be and their interests as follows:

[fol. 6]

Daniel Bayhylle, son	2/12ths,
Violet Bayhylle, daughter	2/12ths,
William R. Bayhylle, son	2/12ths,
Louis D. Bayhylle, son	2/12ths,
Elmer Bayhylle, son	2/12ths,
Perry W. Moore, grandson	1/12th,
Lucille M. Moore, grand-daughter	1/12th.

That the title to the real estate above described allotted to William Bayhylle, of which only

Lot Six and the Southwest Quarter of the Southeast Quarter of Section Seventeen, Township Twenty-three North of Range Four East of the Indian Meridian

is herein involved, is now held in trust by the United States of America for the following heirs and their respective interests in the estate of William Bayhylle set opposite their names, is as follows:

Edward Bayhylle	3/84ths,
Daniel Bayhylle	14/84ths,
Violet Bayhylle	14/84ths,
William R. Bayhylle	14/84ths,
Louis D. Bayhylle	14/84ths,
Elmer Bayhylle	14/84ths,
Perry W. Moore	3/84ths,
Lucille M. Moore	3/84ths.

X

That on the 24th day of November, 1906, a trust patent was issued as provided by law to Ethel Lewis Barnes, an Indian of the Otoe Tribe, being allottee No. 454, to the following described real estate, to-wit:

The South Half of the Southeast Quarter and the Northeast Quarter of the Southeast Quarter and the Lot numbered Five of Section Twenty-four, in Township Twenty-three, North of Range Three East of the Indian Meridian, in Oklahoma, containing One Hundred fifty-two acres and twenty-hundredths of an acre

That the title to the above described real estate so allotted to Ethel Lewis Barnes of which only

[fol. 7] Lot Five of Section Twenty-four, Township Twenty-three, North of Range Three East of the Indian Meridian in Oklahoma

is involved herein is now held in trust by the United States of America for the said allottee Ethel Lewis Barnes.

XI

That on the 10th day of June, 1907, a trust patent was issued as provided by law, to Anne Robedeaux an Otoe In-

dian, being allottee number 409-A to the following described real estate, to-wit:

The West Half of the Southeast Quarter and the Southeast Quarter of the Southeast Quarter of Section One, and the Southwest Quarter of the Northeast Quarter of Section Thirteen in Township Twenty-two North of Range One East, Lot numbered Six of Section Twenty-four in Township Twenty-three North of Range Three, East of the Indian Meridian in Oklahoma, and containing Two hundred five acres and forty-five hundredths of an acre.

That the said Anna Robedeaux died on or about June 4th, 1933, her heirs being determined and the Department of the Interior found them to be

Belle Robedeaux, Pearl Robedeaux, Mary Robedeaux, Naomi Robedeaux,

and each of whom received a one-fourth interest in and to the above described real estate allotted to the said Anna Robedeaux. That thereafter Belle Robedeaux died leaving as her heirs, so determined and found to be by the Department of the Interior,

William Burgess, Dewey W. Daily, Esther Burgess, Earl Burgess, Lucy Burgess, Annie Burgess, Curtis F. Burgess, each of whom inherited a one-seventh interest in and to the estate of Belle Robedeaux. That the title to the real estate above described allotted to Anna Robedeaux of which only

Lot Six of Section Twenty-four, Township Twenty-three, North of Range Three East of the Indian Meridian, in Oklahoma

[fol. 8] is herein involved, is now held in trust by the United States of America for the following heirs of Anna Robedeaux and their respective interests in the estate set opposite their names, is as follows:

Pearl Robedeaux	9/36ths,
Mary Robedeaux	9/36ths,
Naomi Robedeaux	9/36ths,
William Burgess	3/36ths,
Dewey W. Daily	1/36th,
Esther Burgess	1/36th,
Earl Burgess	1/36th,

Lucy Burgess 1/36th,
Annie Burgess 1/36th,
Curtis F. Burgess ..... 1/36th.

XII

That under the lands above described being herein involved and which are held in trust by the United States of America for the respective allottees and the heirs of the deceased allottees, valuable deposits of minerals, to-wit, oil and gas exist. That a proven oil field has been discovered and is being developed in the immediate vicinity of the real estate herein involved.

XIII

That on or about the 20th day of July, 1942, the Commissioners of the Land Office of the State of Oklahoma purporting to act under and in pursuance of the authority of the State of Oklahoma, but without the authority and consent of the above named allottees or the heirs of the deceased allottees and without the consent or approval of the Secretary of the Interior executed to and in favor of the Champlin Refining Company, Enid, Oklahoma, an instrument in writing purporting to be an oil and gas lease upon the lands therein described as follows, to-wit:

Beginning at the Northeast (NE) corner of Lot 5 of Sec. 17-23N-4E, thence North along the projection of the East Boundary of said Lot 5 to the Southern boundary of the Osage Nation, being the center line of the main channel of the Arkansas River, thence Westerly along the said center [fol. 9] line of the main channel of the Arkansas River to a point where the said center line intersects the projection of the West Boundary line of Sec. 19-23N-4E, thence South along the projection of said Western boundary line of Sec. 19-23N-4E, to the Northwest (NW) corner of Lot 2 of said Sec. 19-23N-4E, thence Easterly along the Northern boundaries of Lots 2 and 1 of Sec. 19, Lots 9 and 6 of Sec. 18, Lots 8, 7, 6 and 5 of Sec. 17, all in 23N-4E, as said lots are shown on the recorded Government Plat thereof, to point of beginning.

It is being the intention hereof to lease all of the bed of the Arkansas River lying South of the Southern Boundary of the Osage Nation, being the center line of the main chan-

nel of the said river in Section 17, 18, 19, in Township 23 North, Range 4 East, and containing 157 Acres, more or less.

A copy of said instrument of writing is hereto attached and made a part hereof and marked "Exhibit A".

XIV

That on or about the 20th day of July, 1942, the Commissioners of the Land Office of the State of Oklahoma purporting to act under and in pursuance of the authority of the State of Oklahoma, but without the authority and consent of the above named allottees of the heirs of the deceased allottees and without the consent or approval of the Secretary of the Interior executed to and in favor of the Champlin Refining Company, Enid, Oklahoma, an instrument in writing purporting to be an oil and gas lease upon the lands therein described as follows, to-wit:

Beginning at the Northeast (NE) corner of Lot 5 of Sec-24-23N-3E, thence North along the projection of the Eastern Boundary of said Lot 5 to a point where the said projection intersects the Southern Boundary of the Osage Nation, being the center line of the main channel of the Arkansas River, thence Westerly along the main channel of the Arkansas River to a point where the said center line intersects the projection of the Western Boundary line of Sec. 15-23N-3E, thence South along the projection of the said boundary line of said Sec. 15-23N-3E to the Northwest (NW) corner of Lot 7 of Sec. 15-23N-3E, thence South along the West boundaries of Sections 15 and 22-23N-3E, to the [fol. 10] Southern Boundary of Lot 1 of Sec. 21-23N-3E, thence Southwesterly along the Southeastern Boundary of Lot 1, of Sec. 21-23N-3E, to the East Boundary line of the W/2 of NE/4 of Sec. 21-23N-3E, thence Southerly along the said East Boundary line of the W/2 of NE/4 of Sec. 21-23N-3E, to the Southern Boundary thereof, thence Southerly along the Eastern boundary of the NW/4 of SE/4 of Sec. 21-23N-3E, to the Northwest (NW) corner of Lot 4 of Sec. 21-23N-3E, thence Easterly along the Northern Boundaries of Lot 4 of Sec. 21, Lots 11, 12, 13 and 14 of Sec. 22, Lots 9, 8, 7, and 6 of Sec. 23, lots 8, 7, 6, and 5 of Sec. 24, all in 23N-3E to the point of beginning, excluding however, Lots 5-6 and 7 of Sec. 15, Lots 1, 2, 3, 4, 5, 7, 8, 9, and 10 of Sec. 22, Lot 3 of Sec. 21, Lots 10, 11 and 12 of Sec. 23, all in

23N-3E, as said Lots are shown on the recorded Government Plat thereof.

It being the intention hereof to lease all of the bed of the Arkansas River lying South of the Southern Boundary of the Osage Nation, being the center line of the main channel of the said river in Section 15, 21, 22, 23 and 24, in Township 23 North, Range 3 East, and containing 281 Acres, more or less.

A copy of said instrument of writing is hereto attached and made a part hereof and marked "Exhibit B".

XV

That both of the purported leases above mentioned were executed without the authority of the plaintiff herein or the allottees, or of the heirs of the deceased allottees of the lands herein involved and without the consent or approval of the Secretary of the Interior.

XVI

That the Arkansas River at the points herein involved was not a navigable stream within the purview of the laws of the United States at the time the State of Oklahoma was admitted to the Union. That the navigability of the Arkansas River at said time and at the points and places herein involved has been passed upon and determined in the case of United States v. Brewer-Elliott Oil and Gas Company 260 U. S. 77, wherein the Supreme Court of the United [fol. 11] States affirmed the decisions of the United States District Court for the Western District of Oklahoma and the Circuit Court of Appeals for this circuit in the finding that the Arkansas River was not navigable at the time Oklahoma was admitted to the Union.

XVII

That under and by virtue of the above mentioned leases, the defendants, or either or both of them are asserting certain rights, titles, claims and interests in and to the oil and gas in and under the bed of said Arkansas River and within the boundaries of the allotments heretofore described which are held in trust by the plaintiff for the benefit of the allottees and the heirs of the deceased allottees. That the defendants or either or both have threatened and are threat--ning to begin prospecting for oil and gas in said Arkansas

River bed and within the boundaries of the above described allotted lands, and if said threats are carried into execution it will be without the authority of the plaintiff or the allottees or heirs of the deceased allottees interested herein or the Secretary of the Interior.

XVIII

That the State of Oklahoma, as the plaintiff verily believes, has no proprietary title or interest in the bed of the Arkansas River and is wholly without power or authority to convey or confer by lease or otherwise any proprietary interest or title in such river bed and particularly in or to that portion of the bed of the Arkansas River which has been allotted to or adjoins the allotments heretofore described and involved herein and which the United States of America holds in trust for the benefit of said allottees and the heirs of the deceased allottees mentioned.

XIX

That the said defendants or either or both are trespassing and clouding the title to the portion of the land heretofore described and involved herein and threaten to continue to do so. That the instruments heretofore referred to and which are attached hereto and marked "Exhibit A and B" have been placed of public record in the office of the Secretary [fol. 12] of the Commissioner of the Land Office of the State of Oklahoma and constitute a cloud on the title of the United States of America and the allottees and heirs of the deceased allottees above set out, to that portion of the oil and gas minerals under the said Arkansas River bed belonging to said allottees, and the heirs of the deceased allottees and held in trust by the United States of America, and are depreciating the value thereof and are hindering the control and supervision of the United States over said minerals and the leasing thereof for the use and benefits of the Indian allottees and the heirs of the said deceased allottees. That the United States is under the governmental duty and obligation of protecting the Indians involved and their property rights in the premises and is charged with the proper and diligent exercise of its trust in behalf of said Indians and for the proper performance of its duty in the premises, it is necessary to seek relief from this Court to the ends that the defendants or either or both of them should not only be ousted from the possession of said lands and minerals, so

held in trust, but that the Court may order that said instruments of writing, copies of which are hereto attached as Exhibits "A" and "B" be surrendered for cancellation and cancelled and the records purged thereof and may forever enjoin the defendants from asserting any interest whatsoever in said lands and minerals adverse to the plaintiff and the allottees and the heirs of the deceased allottees herein involved.

Wherefore the plaintiff now prays that the defendants, Champlin Refining Company, a corporation of Iowa, duly authorized to and doing business in the State of Oklahoma, and the Champlin Refining Co., a corporation of New Mexico duly authorized to and doing business in the state of Oklahoma and either or both of them, which ever is herein involved and claims an interest under and by virtue of the purported leases heretofore referred to, the exact one being unknown to the plaintiff, be enjoined from committing a trespass or a continuous trespass upon said river bed and minerals thereunder belonging to the Indians involved and held in trust by the United States for their benefit as heretofore set out, or entering upon the same, or prospecting [fol. 13] for or mining or removing oil or gas therefrom. That the above described instruments of writing, copies of which are hereto attached and marked Exhibits "A" and "B" be ordered surrendered for cancellation and be cancelled and held null and void insofar as same purport to effect or cover or convey the said lands or river bed and minerals thereunder so held in trust by the United States for the allottees named and the heirs of the deceased allottees involved. That the defendants, or either of them, which ever asserts its claim, and all persons claiming by, through or under them, be forever enjoined from asserting any right, title or interest in or to said lands and the oil and gas and minerals thereunder adverse to plaintiff and the Indians herein named. That the title to said lands and minerals be quieted in the United States and said allottees and the heirs of the deceased allottees entitled thereto and that the defendants and each or both of them, which ever is involved, and their agents, employees, successors and assigns be enjoined from drilling or prospecting for oil and gas in said river bed within the limits of the lands herein involved now held in trust by the United States for the benefit of the above named Indians and that during the pendency of this action

and until the further order of the Court, the defendants and each of them, their agents, employees, successors and assigns, be restrained and enjoined from drilling or prospecting for oil and gas on said land as above described and that plaintiff have such other and further relief as it may be entitled to in the premises.

Whit Y. Mauzy, United States Attorney. Wm. Knight Powers, Assistant United States Attorney.

[File endorsement omitted.]

[fol. 14] EXHIBIT "A" TO COMPLAINT

The State of Oklahoma

Oil and Gas Mining Lease

Tract No. 14

This Indenture of Lease, Made and entered into duplicate, on the 20th day of July A. D., 1942, by and between The Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Champlin Refining Company, Enid, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Constitution and Laws of the State of Oklahoma, relating to the segregation of the oil and gas deposits and the leasing thereof on school and other public lands belonging to the State of Oklahoma, Witnesseth:

1. The lessor, for and in consideration of Three Hundred Fifty-four & No/100 ($354.00) Dollars, the receipt whereof is hereby acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained and hereby agreed to be paid, observed and performed by the lessee, and his lawful assigns:

[The description of the lands, which is set out at this point in the lease, is identical with the description set out in paragraph 13 of the complaint (page 8 this record.)]

does hereby demise, grant, lease and let unto the lessee for the term of five years from the date hereof, and as long there-

after as oil or gas or either of them is produced in paying quantities, all of the oil deposits and natural gas in or under the following described tract of land lying and being within the County of Pawnee, in the State of Oklahoma, to-wit:

Tract No. 14. That portion of the Bed of the Arkansas River in Pawnee County, Oklahoma as above described:

and containing 157 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry [fol. 15] on the work of prospecting for, extracting, piping, storing and removing such oil and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owners or lessee, and also the right to use, free of cost, oil and natural gas or fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to deliver or cause to be delivered to The Commissioners of the Land Office of the State of Oklahoma, or their successors, a royalty, of one-eighth part of the oil or gas produced from the leased premises or in lieu thereof, pay to the State the market value of said royalty interest, as the Commissioners may elect. All oil and gas due to the State under this contract, shall be delivered by the lessee herein, free of cost, into pipe lines, tanks or cars, or settled or paid for before removing same from the premises if handled in any other way. The lessee shall furnish to the lessor certified copies of gauge tickets, sales, shipments and amount of gross production, at their office in Oklahoma City. Gas to be metered on the premises under high pressure, unless some other method of gauging and metering same shall be hereafter agreed upon by the parties hereto in writing.

3. The lessee hereby agrees to deliver or cause to be delivered to the Commissioners of the Land Office, of said State, a royalty of one-eighth of all casinghead or drip, gas or gasoline, produced or extracted from any gas produced from any well on said premises, or in lieu thereof, pay the State the market value of said royalty interest as the Commissioners of the Land Office may elect. The term "casinghead gas" shall be construed to mean gas which is produced

from the same sand from which oil is produced, whether it be taken from flow tank or trap for the handling of flowing wells, or issued from the casinghead of an oil well equipped for pumping.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on the land covered by this lease, and shall drill a sufficient number of wells to offset the wells upon adjoining contiguous premises, said offset wells to be [fol. 16] commenced within ten days after completion of any producing well upon such adjoining contiguous premises unless a different time is prescribed by notice in writing from the lessor, and be prosecuted diligently and continuously until completed; and the said lessee shall operate the leased premises for oil and gas to the same extent as individual and corporate premises are being operated within the general oil and gas fields where such land is located, and failure to faithfully comply with this provision shall be cause for forfeiture of this lease to the State.

5. At least one well producing oil or gas in paying quantities shall be drilled and completed within one year from the date hereof, or failing so to do the lessee shall pay to the lessor for each whole year the completion of such a well is delayed, for not to exceed five years from the date hereof, in addition to the other consideration named herein, rental of One ($1.00) Dollar per acre, payable annually, in advance, and if the lessee shall fail to drill at least one such well within any such yearly period, and shall fail to surrender this lease on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken as conclusively evidencing the election and covenant of the lessee to pay the rental of One ($1.00) Dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen (15) days after it becomes due at the end of any yearly period during which a well has not been completed as herein provided, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation thereof, but such cancellation shall not in any wise operate to release or relieve the lessee from the convenants and obligations to pay such rental or any other accrued obligation. It being understood that the completion of one well producing oil or gas in paying quantities

during the life of this lease, shall relieve the lessee of all future liability for said $1.00 per acre hereunder, but the lessee shall nevertheless remain obligated to drill an offset, or necessary offsets, and other wells necessary to the proper development and operation of said lease as herein otherwise provided; and provided further that unless a producing well [fol. 17] of oil or gas is completed on the above described premises within five years from the date hereof this lease shall be void.

6. The lessee shall carry on the development and operation in a workmanlike manner; commit no waste on said land, and suffer none to be committed upon the portion in his occupancy or use; take good care of the same, and promptly surrender and return the premises upon the termination of this lease to the lessor, or to whomsoever shall be lawfully entitled thereto, unavoidable casualty only excepted.

7. All tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells, shall remain the property of the lessee, and may be removed at any time prior to or at the termination of the lease by forfeiture or otherwise; and the lessee shall not permit any nuisance to be maintained on the premises; and shall not use said premises for any purposes than those authorized in the lease; and before abandoning any well, shall securely plug the same so as to effectually shut off all water from the oil bearing stratum, or in the manner required by the laws of the State of Oklahoma.

8. The lessees shall keep an accurate account of all oil and gas mining operations, including a log of each well drilled, duly sworn to by the contractor or driller, which shall be filed with the Secretary to The Commissioners of the Land Office within thirty days after said well is completed. Accurate and reliable information concerning all wells and their operation and management shall be furnished to The Commissioners of the Land Office or their representatives upon demand. The said lessee shall also keep an accurate account showing the sales, prices, dates, purchases, and the whole amount of oil and gas mined or removed, and all sums due as royalties shall be a lien on the implements, tools and movable machinery or personal chattels used in operating said property, and also upon all the unsold oil

and gas obtained from the land herein leased as security for the payment of said royalties.

9. The lessee shall be liable to the surface owner or surface lessee for all damages or loss accruing to the surface [fol. 18] interests in said land, and to all crops and improvements, thereupon and appurtenances and hereditaments thereunto belonging by reason of the oil and gas mining operations hereunder, and in the event the amount of such damage cannot be agreed upon by the lessee hereof and such surface owner or lessee, then the amount of such damage shall be determined as is or may be provided by law. The lessee hereof further agrees to pay all such damages within ten days after the amount thereof is determined, and the amount of such damages may be recovered from the lessee hereof and his sureties upon the bond given to secure the faithful performance of this lease.

10. This lease shall be subject to the constitution and laws of the State of Oklahoma and the rules and regulations of The Commissioners of the Land Office now or hereafter in force relative to such leases; all of which are made a part and condition of this lease; Provided, That no regulations made after the execution of this lease affecting either the length of the term hereof, the rate of royalty, or payment hereunder or the assignment hereof, shall operate to affect the terms and conditions of this lease.

11. No transfer or assignment of this lease or any part thereof, shall be valid, or convey any right in the assignee without the consent in writing of The Commissioners of the Land Office; and such assignee shall furnish a bond to the satisfaction of The Commissioners of the Land Office, conditioned for the faithful performance of the covenants and conditions of this lease, and pay an assignment fee of Five Dollars.

12. Before this lease shall be in force and effect the lessee shall give a good and sufficient bond in the sum of One Thousand & No/00 ($1,000.00) Dollars, to be approved by the Commissioners of the Land Office, for the faithful performance of this lease.

13. Upon the violation of any of the substantial terms or conditions of this lease, The Commissioners of the Land

Office shall have the right at any time after hearing upon ten days notice, given by registered mail to the last known address of such lessee, or by posting notice in writing in a [fol. 19] conspicuous place upon the premises, specifying the terms or conditions violated, to declare this lease null and void; and the said Commissioners for and on behalf of the State of Oklahoma, shall be entitled to recover from the lessee's bondsmen, all rents, royalties, charges, claims of every kind and nature due and owing and accruing and arising out of and by reason of this lease, on failure to comply with the provisions thereof, and the lessors shall be entitled and authorized to take immediate possession of the land.

14. It is further agreed that for any refinery of crude oil and its products and bi-products, owned and controlled by the State of Oklahoma, the State shall have preference right to purchase and receive the output from said premises at the market price thereof: Provided; that this clause shall not prevent the lessee from selling the output of said leases to any person, firm or corporation whatsoever until notice in writing from The Commissioners of the Land Office shall be served on the lessee that the State is ready to take such oil and gas or either of them, and all sales of oil and gas or either of them under this proviso shall be valid and binding.

15. The lessee may at any time hereafter surrender and wholly terminate this lease upon payment of the rentals and other liabilities then accrued and due hereunder, and may exercise such right by filing a formal relinquishment and release of the said lease with the Secretary to The Commissioners of the Land Office; Provided, that if such lease has been recorded by causing the release thereof to be filed and recorded in the proper recording office, and upon a compliance with these requirements such lessee shall thereby be relieved from liability for rental thereafter accruing.

Lessor agrees that this lease or any portion or portions thereof may be consolidated and jointly operated with the lease or leases covering any adjoining property or properties to such extent and in drilling units of such size as may be required to obtain a permit to drill a well or wells upon the property covered by this lease or adjoining leases, under the terms of any Federal or State statute or any rule or regulation of any Federal or State Commission or agency. If said lease or any portion or portions thereof are so con-

[fol. 20] solidated and jointly operated, then and in such event it is agreed that the royalties produced from any well drilled upon any such community tract shall be prorated among the owners thereof in such proportion as the acreage owned by each Lessor bears to the acreage of the entire drilling unit.

16. The surface owner or lessee of said premises shall have gas free of cost from any well on said premises for domestic use thereon by making his own connection with the well.

In Witness Whereof, the parties hereunto subscribed their signatures on the day and year first above written.

The Commissioners of the Land Office of the State of Oklahoma, by C. C. Childers, Vice Chairman; Champlin Refining Company, Lessee, by H. H. Champlin, President. (Seal.)

Attest: Chas. B. Steele, Secretary to the Commissioners of the Land Office.

Attest: D. W. Cotton, Secretary. (Verified.)

EXHIBIT "B" TO COMPLAINT

The State of Oklahoma

Tract No. 15,

Oil and Gas Mining Lease

This Indenture of Lease, Made and entered into in duplicate, on this the 20th day of July A. D., 1942, by and between The Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Champlin Refining Company Enid, Oklahoma. party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Constitu- [fol. 21] tion and Laws of the State of Oklahoma, relating to the segregation of the oil and gas deposits and the leasing thereof on school and other public lands belonging to the State of Oklahoma, Witnesseth:

1. The lessor, for and in consideration of Three Thousand One Hundred Twenty-five & No/100 ($3,125.00) Dollars, the receipt whereof is hereby acknowledged, and of the

royalties, covenants, stipulations and conditions hereinafter contained and hereby agreed to be paid, observed and performed by the lessee, and his lawful assigns:

[The description of the lands, which is set out at this point in the lease, is identical with the description set out in paragraph 14 of the complaint (page 9 this record).]

does hereby demise, grant, lease and let unto the lessee for the term of five years from the date hereof, and as long thereafter as oil or gas or either of them is produced in paying quantities, all the oil deposits and natural gas in or under the following described tract of land lying and being within the County of Pawnee, in the State of Oklahoma, to-wit:

Tract No. 15. That portion of the Bed of the Arkansas River in Pawnee County, Oklahoma as above described,

and containing 281 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing and removing such oil and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost, oil and natural gas or fuel so far as necessary to the development and operation of said property.

[Paragraphs 2 to 16 of the lease are identical with paragraphs 2 to 16 of Exhibit A, which paragraphs appear at pages 15 to 20.]

[fol. 22] In Witness Whereof, the parties hereunto subscribed their signatures on the day and year first above written.

The Commissioners of the Land Office of the State of Oklahoma, by C. C. Childers, Governor and Chairman; Champlin Refining Company, Lessee, by H. H. Champlin, President. (Seal.)

Attest: Chas. B. Steele, Secretary to the Commissioners of the Land Office.

Attest: D. W. Cotton, Secretary. (Verified.)

IN UNITED STATES DISTRICT COURT

DISCLAIMER—Filed August 5, 1943

Comes Now the Champlin Refining Company, a corporation, organized and existing under the laws of Iowa, and disclaims all right, title, and interest in and to the property described in the Complaint filed in this action, and asks that this action be dismissed as to this defendant, with its costs.

Nathan Scarritt, E. S. Champlin, Enid, Oklahoma, Attorneys for Champlin Refining Company, an Iowa Corporation.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed August 5, 1943

The defendant, Champlin Refining Company, a New Mexico Corporation states as follows in answer to the Complaint of the Plaintiff:

The defendant admits the allegations contained in Paragraph I of the Complaint, that it is a corporation organized [fol. 23] and existing under the laws of New Mexico with license to do business in Oklahoma, and with principal place of business in Enid, Oklahoma.

Further answering, this defendant admits the allegations of Paragraphs II to XV, inclusive, of the Complaint:

Denies the allegations of Paragraph XVI of the Complaint;

Admits the allegations of paragraph XVII of the Complaint;

Denies the allegations of paragraph XVIII of the Complaint;

Denies the allegations of paragraph XIX of the Complaint to the effect that the defendant is trespassing upon the property described in the Complaint; admits the allegation to the effect that the instruments referred to in the

Complaint as Exhibits "A" and "B" have been placed of record in the office of the Secretary of the Commissioners of the Land Office of the State of Oklahoma, but denies that the United States holds title to the said property as Trustee for the allottees and their heirs as named in the Complaint, and denies that the defendant should be ousted from possession, or that the instruments referred to in the Complaint as Exhibit- "A" and "B" should be cancelled.

Wherefore, this defendant asks that the plaintiff take nothing by its Complaint, and for the costs of this action.

Nathan Scarritt, E. S. Champlin, Enid, Oklahoma, Attorneys for Champlin Refining Company, a New Mexico Corporation.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF STATE OF OKLAHOMA ON RELATION OF COMMISSIONERS OF THE LAND OFFICE TO INTERVENE—Filed August 20, 1943

Comes now the State of Oklahoma on the relation of the Commissioners of the Land Office and respectfully shows to the Court and alleges:

[fol. 24] 1. That the plaintiff claims to hold the lands or river bed and minerals thereunder, referred to in plaintiff's petition, in trust for the Indian allottees named in said petition and the heirs of the deceased allottees involved, and seeks to have cancelled and held for naught certain oil and gas leases, covering said lands, obtained by the defendant, Champlin Refining Company, a New Mexico corporation, from the State of Oklahoma on the relation of the Commissioners of the Land Office, and by said petition the plaintiff seeks to quiet title to said lands and minerals in the United States and said allottees and the heirs of the deceased allottees referred to in said petition; that the State of Oklahoma claims title to the lands and river bed described in plaintiff's petition and asserts that it is entitled as lessor to have said lands developed for oil and gas under the leases which plaintiff seeks to have cancelled; that the State of Oklahoma, by reason of its claim, is not

only an interested party but a necessary and indispensable party to a full and complete determination of plaintiff's action.

2. That this motion to intervene is filed under Rule 24 of the Federal Rules of Civil Procedure; that the representation of movant's interest in this litigation by existing parties is inadequate, and plaintiff by its action is seeking to bind the State of Oklahoma by a judgment in this action; and the claim or defense which the State of Oklahoma desires to make in this action involves both questions of law and fact in common with and adverse to the claims set forth in plaintiff's petition.

3. That the State of Oklahoma on the relation of the Commissioners of the Land Office desires to be permitted to intervene as a party defendant in this cause and a copy of the answer to plaintiff's petition, which the State of Oklahoma proposes to file in this cause if permitted to intervene herein, is attached hereto and made a part hereof.

Wherefore, movant prays for an order allowing the State of Oklahoma on relation of the Commissioners of the Land Office to intervene as a defendant in this action and enabling movant to defend this action for the purposes of protecting [fol. 25] its interest and asserting its right and title to the lands and minerals referred to in plaintiff's petition, or that movant have such other or further relief as to the Court may seem just and proper.

Mac Q. Williamson, Attorney Gen-ral of Oklahoma; J. Walker Field, Assistant Attorney General; Walter Marlin, Law and Executive Counsel to Commissioners of Land Office, State Capitol Building, Oklahoma City, Oklahoma, Attorneys for Movant.

Service of copy acknowledged this 18th day of August, 1943. Whit Y. Mauzy, U. S. Atty.

[Verified.]

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO INTERVENE—Filed August 20, 1943

This cause coming on to be heard on the 20 day of August, 1943, on the motion of the State of Oklahoma on the relation of the Commissioners of the Land Office for leave to intervene in the above entitled cause and to be made a party defendant thereto, and the motion having been duly considered and it appearing to the Court that movant has an interest in the above entitled suit sufficient to warrant it to become a party therein:

It Is Therefore Ordered, Adjudged and Decreed that the State of Oklahoma on the relation of the Commissioners of the Land Office be and is hereby granted leave to intervene in said cause as a party defendant.

Dated this 20 day of August, 1943.

Royce H. Savage, United States District Judge.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

INTERVENING ANSWER OF THE STATE OF OKLAHOMA ON RELATION OF THE COMMISSIONERS OF THE LAND OFFICE

Comes now the State of Oklahoma on the relation of the Commissioners of the Land Office, leave having first been granted by the Court to said State to intervene as a party defendant in this cause, and for separate answer to plaintiff's complaint alleges and states:

1. Intervening defendant admits the allegations contained in Paragraph I of plaintiff's complaint.

2. Intervening defendant denies the allegations contained in Paragraph II of plaintiff's complaint.

3. Intervening defendant denies the allegations contained in Paragraph III of plaintiff's complaint.

4. Intervening defendant denies the allegations contained in Paragraph IV of plaintiff's complaint.

5. Intervening defendant denies the allegations contained in Paragraph V of plaintiff's complaint.

6. Intervening defendant denies the allegations contained in Paragraph VI of plaintiff's complaint.

7. Intervening defendant denies the allegations contained in Paragraph VII of plaintiff's complaint.

8. Intervening defendant denies the allegations contained in Paragraph VIII of plaintiff's complaint.

9. Intervening defendant denies the allegations contained in Paragraph IX of plaintiff's complaint.

10. Intervening defendant denies the allegations contained in Paragraph X of plaintiff's complaint.

11. Intervening defendant denies the allegations contained in Paragraph XI of plaintiff's complaint.

12. Intervening defendant denies the allegations contained in Paragraph XII of plaintiff's complaint.

13. Intervening defendant admits the allegations contained in Paragraph XIII of plaintiff's complaint, and alleges further that the State of Oklahoma is the owner in fee simple and in possession of the lands described in said Paragraph XIII of plaintiff's complaint, the same being [fol. 27] the lands described in and covered by the oil and gas lease attached to and made a part of said complaint as "Exhibit A"; that said lands became the property of the State of Oklahoma by operation of law upon its admission as a State.

14. Intervening defendant admits the allegations contained in Paragraph XIV of plaintiff's complaint, and alleges further that the State of Oklahoma is the owner in fee simple and in possession of the lands described in said Paragraph XIV of said complaint, the same being the lands described in and covered by the oil and gas lease attached to and made a part of said complaint as "Exhibit B"; that said lands became the property of the State of Oklahoma by operation of law upon its admission as a State.

15. Intervening defendant admits the allegations contained in Paragraph XV of plaintiff's complaint.

16. Intervening defendant denies the allegations contained in Paragraph XVI of plaintiff's complaint.

17. Intervening defendant admits the allegations contained in Paragraph XVII of plaintiff's complaint.

18. Intervening defendant denies the allegations contained in Paragraph XVIII of plaintiff's complaint.

19. Intervening defendant, denies the allegations contained in Paragraph XIX of plaintiff's complaint to the effect that the defendant, Champlin Refining Company, a New Mexico corporation, is trespassing upon the property described in the complaint; and intervening defendant admits the allegation in said paragraph of the complaint to the effect that the instruments, referred to in the complaint as "Exhibits A and B", have been placed of record in the office of the Secretary of the Commissioners of the Land Office of the State of Oklahoma. Further intervening defendant denies that the United States holds title to said property as trustee for the allottees and their heirs, as named in the complaint, and denies that the defendant, Champlin Refining Company, a corporation, should be ousted from possession or that the instruments, referred to in the complaint as "Exhibits A and B", should be cancelled. Further answering said paragraph of the complaint, [fol. 28] intervening defendant alleges that the plaintiff and the allottees and the heirs of the deceased allottees, referred to in said complaint, have no right, title or interest in and to the lands involved in this action and are not entitled to an injunction enjoining the lessee of the State of Oklahoma from developing said lands for oil and gas under the leases obtained from the State of Oklahoma, and described in said complaint as "Exhibits A and B" thereto.

Wherefore, intervening defendant prays that the plaintiff take nothing by its complaint and for its costs.

Mac Q. Williamson, Attorney General of Oklahoma; J. Walker Field, Assistant Attorney General; Walter Marlin, Law and Executive Counsel to Commissioners of the Land Office, State Capitol Building, Oklahoma City, Oklahoma, Attorneys for Intervening Defendant.

[Verified.]

Affidavit of Mailing

State of Oklahoma,
Oklahoma County, ss:

Walter Marlin being duly sworn upon oath, deposes and says that on the 18th day of August, 1943, the enclosed a copy of the attached Motion in an envelope addressed to: Honorable Nathan Scarritt, Attorney at Law, Enid, Oklahoma, Attorney for Champlin Refining Company, with postate thereon fully prepaid, and deposited the same in the United States Post Office at the State Capitol, in Oklahoma City, Oklahoma.

Walter Marlin.

Subscribed and sworn to before me this 18th day of August, 1943. Jean Brawner, Notary Public. My commission expires October 27, 1945. (Seal.)

In United States District Court

Amendment to Answer—Filed October 15, 1943

For amendment to its answer filed herein, Champlin Refining Company alleges that the United States Supreme Court has confirmed the right of the State of Kansas to declare the rivers within its borders as navigable rivers, [fol. 29] and has confirmed the title of the state in and to the bed of such rivers.

The State of Kansas has declared the Arkansas river to be navigable within its boundaries and the title of the State of Kansas to the bed of such river has never been disputed because of the decision of the United States Supreme Court above mentioned, the bed of the said river having been a portion of the public domain of the United States at the time of the admission of the State of Kansas into the Union.

The claim of the plaintiff that a different rule should be applied to that portion of the bed of the Arkansas River which was a part of the public domain of the United States within the boundaries of Oklahoma would be a denial to the State of Oklahoma and to this defendant of the equal protection of the laws in violation of the Constitution of the United States.

Nathan Scarritt, E. S. Champlin, Attorneys for Champlin Refining Company.

[File endorsement omitted.]

In United States District Court

Amendment to Intervening Answer—Filed October 22, 1943

For amendment to its intervening answer filed herein, the State of Oklahoma on relation of the Commissioners of the Land Office alleges that the United States Supreme Court has confirmed the right of the State of Kansas to declare the rivers within its borders as navigable rivers, and has confirmed the title of the state in and to the bed of such rivers.

The S-ate of Kansas has declared the Arkansas River to be navigable within its boundaries and the title of the State of Kansas to the bed of such river has never been disputed because of the decision of the United States Supreme Court above mentioned, the bed of said river having been a portion of the public domain of the United States at the time of the admission of the State of Kansas into the Union.

The claim of the plaintiff that a different rule should be [fol. 30] applied to that portion of the bed of the Arkansas River which was a part of the public domain of the United States within the boundaries of Oklahoma would be a denial to the State of Oklahoma and to this defendant of the equal protection of the laws in violation of the Constitution of the United States.

Randall S. Cobb, Attorney General of Oklahoma; J. Walker Field, Assistant Attorney General; Walter Marlin, Law and Exe*f*utive Counsel to Commissioners of the Land Office, State Capitol Building, Oklahoma City, Oklahoma, Attorneys for Intervening Defendant.

Service of Copy Acknowledged This 22 day of Oct. 1943. Whit Y. Mauzy, U. S. Atty.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed November 19, 1943

Pursuant to Rule 56, Federal Rules of Civil Procedure, the plaintiff herein moves for summary judgment on the following grounds:

1. The pleadings in this proceeding, the Exhibits offered in evidence and introduced at the pre-trial conference herein, and the affidavit filed in support of this motion, show that there is no genuine dispute as to any material fact and the plaintiff is entitled to judgment as a matter of law.

2. The only factual allegation traversed by the answer is the declaration in the complaint that the Arkansas River at the points here involved was not navigable at the time the State of Oklahoma was admitted to the Union nor at any prior pertinent time. On this point the determination of non-navigability made by the United — District Court for the Western District of Oklahoma in the proceeding entitled United States v. Brewer-Elliott Oil & Gas Co., et al., No. 75 Equity, affirmed by both the Circuit Court of Appeals and the Supreme Court of the United States, is res [fol. 31] judicata and binding on the defendants in this proceeding.

3. This court can take judicial notice of the fact that, with respect to questions of title, the Arkansas River in Oklahoma above its confluence with the Grand River, was non-navigable at all times pertinent to the facts in this case.

4. The non-navigability of the Arkansas River in Oklahoma above its confluence with the Grand River at all times pertinent to the facts in this case is a law of property with respect to the title to land within the bed of that river.

Wm. Knight Powers, Assistant United States Attorney, Northern District of Oklahoma.

I, Wm. Knight Powers, do hereby certify that on the 19th day of November, 1943, a copy of the foregoing motion was mailed to the Attorney General of the State of Oklahoma, Attorney for Intervener, and a copy to Scarritt and Champlin, Attorneys at Law, Enid, Oklahoma, Attorneys for Defendant herein.

Wm. Knight Powers.

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Wm. Knight Powers, Assistant United States Attorney in and for the Northern District of Oklahoma, and attorney for the plaintiff herein, being of lawful age and first duly sworn, does on oath state:

That there is attached to said Motion for Summary Judgment, Exhibit "A", which exhibit is a map and plat of the Arkansas River wherein said river divides Osage County and Pawnee County, State of Oklahoma. The said map reveals thereon location of Tracts 14 and 15, leases executed by the School Land Commission of the State of Oklahoma to the Champlin Refining Company, and also the tracts of [fol. 32] land which were concerned and involved in the litigation known as United States v. Brewer-Elliott Oil & Gas Company, No. 75 Equity, Western District of the State of Oklahoma. That said map is a faithful reproduction of the area involved and is accurately and correctly prepared so as to show the comparison of the locations of the real estate involved in this litigation and the real estate concerned in the case of United States v. Brewer-Elliott Oil and Gas Company.

Said witness further deposes and says that there is attached hereto and marked Exhibit "B", a map or plat showing Tracts 14 and 15, leased by the School Land Commission, State of Oklahoma to the Champlin Refining Company, which map also shows thereon the tracts of land owned by plaintiff's wards herein as riparian owners.

Witness further deposes and says that there is attached hereto and marked as Exhibit "C", a copy of the opinion rendered in United States v. Brewer-Elliott Oil and Gas Company, et al., No. 75 Equity, Western District of Oklahoma, dated February 21, 1918.

Witness does further on oath state and depose that there is attached hereto and marked Plaintiff's Exhibit "D", Order by John H. Cotteral, District Judge for the Western District, State of Oklahoma, dated February 21, 1918, which Order recited that the findings contained in the written opinion marked Plaintiff's Exhibit "C", shall be and the

same are adopted as the Findings of Fact by the Court therein.

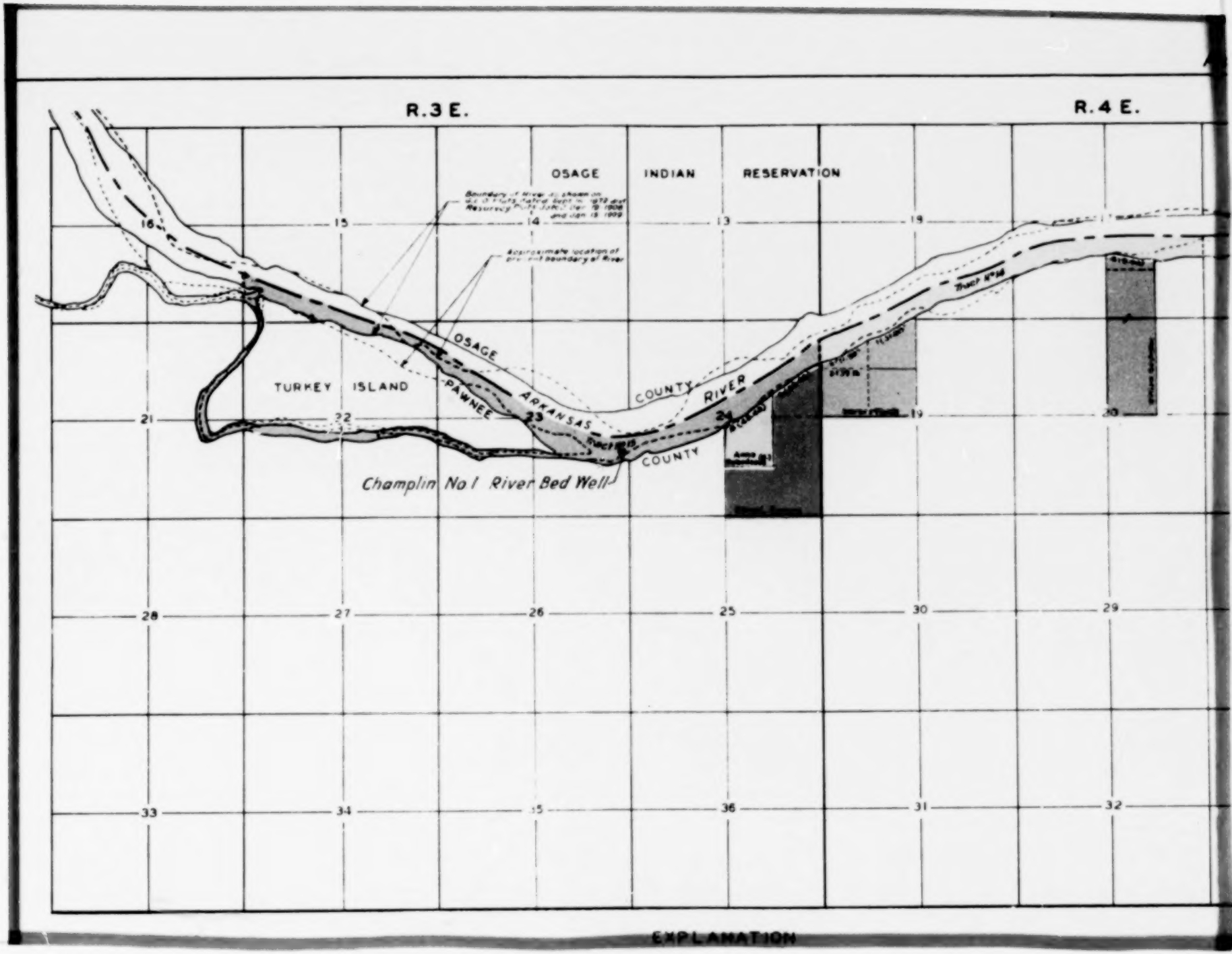
Wm. Knight Powers, Assistant United States Attorney.

Subscribed and sworn to before me this 19 day of Nov. 1943. Dorothy Lonergan, Notary Public. My Commission Expires: Jan. 5, 1944.

[fols. 33-34] EXHIBIT A TO MOTION FOR SUMMARY JUDGMENT

[Exhibit A is a map and plat of Arkansas River wherein said river divides Osage and Pawnee Counties, Oklahoma. It is not deemed practicable to insert a copy of the map in the printed record. Copies of the map are available for the use of the Court.]

(Here follows 1 Photolithograph, side folio 35-36)



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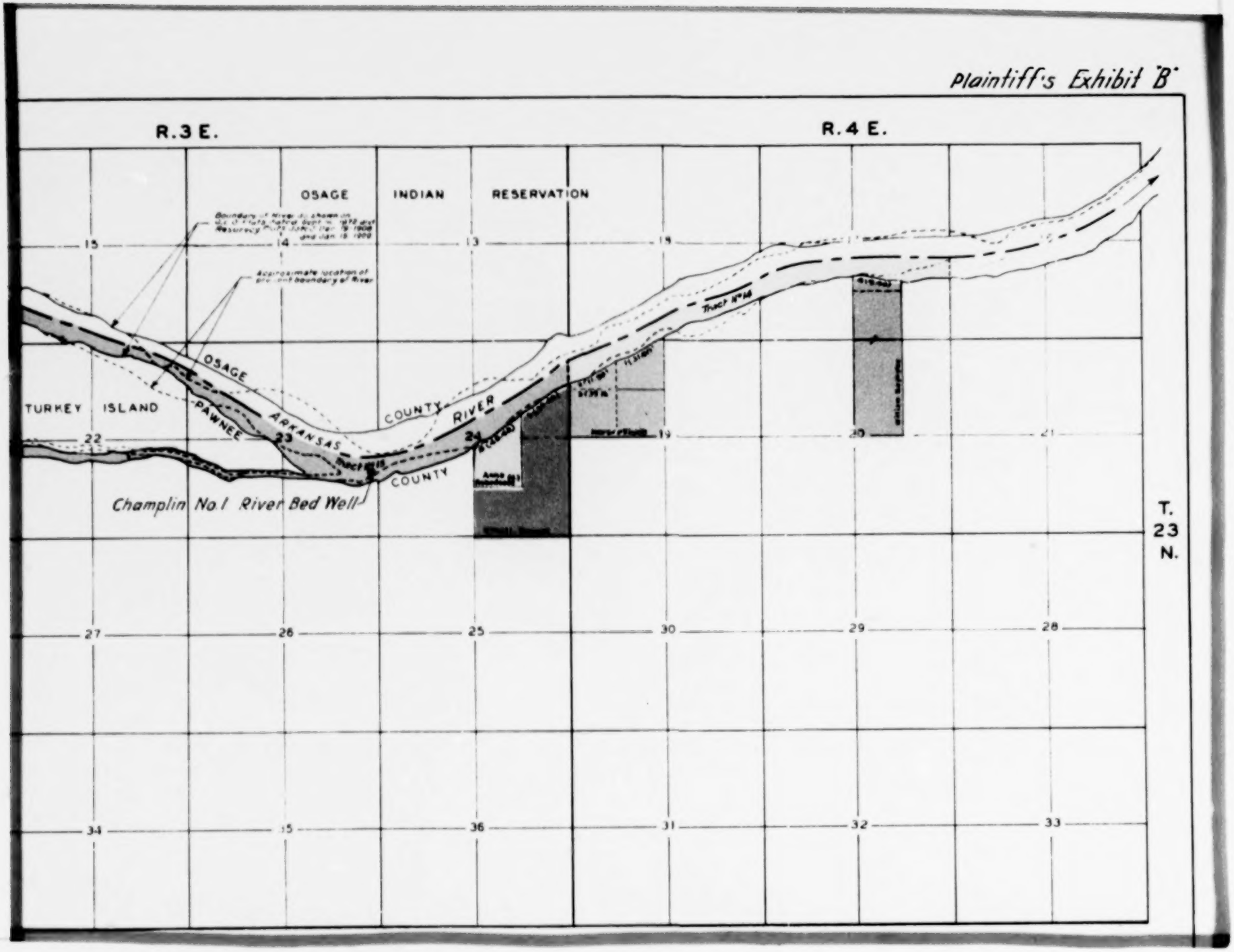
Plaintiff's Exhibit "B"



[fol. 37] [Exhibit C to the motion for summary judgment, opinion, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al., is reported at 249 Fed. 609, and the court by order of May 26, 1945, authorized reference to this exhibit without it being printed.]

[Exhibit D to the motion for summary judgment, order, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al., that findings of fact in the opinion be adopted as findings of fact by the court, is identical with plaintiff's exhibit 23 which appears at original page 135.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed November 19, 1943

Wm. Knight Powers, being first duly sworn on oath, states that he is Attorney for the plaintiff, herein, and that there is attached herewith certified copy of the Decree entered on the 21st day of February, 1918, in the cause, "United States of America, Plaintiff, vs. Brewer-Elliott Oil & Gas Company, et al., Defendants, No. 75, in Equity.

Wm. Knight Powers.

Subscribed and sworn to before me this 2nd day of December, 1943. Dorothy Lonergan, Notary Public. My Commission Expires: Jany. 5, 1944. (Seal.)

I hereby certify that copy of Affidavit in Support of Plaintiff's Motion for Summary Judgment, together with certified copy of Decree has this 2nd day of December, 1943, been mailed to Scarritt & Champlin, Attorneys at Law, Attorneys for Defendant, Enid, Oklahoma, and to the Attor-

ney General of the State of Oklahoma, Attorney for Intervener herein, Oklahoma City, Oklahoma.

Wm. Knight Powers.

Copy of Decree attached withdrawn and entered as [fol. 38] Plaintiff's Ex. No. 24 at trial of cause, which exhibit appears at original page 136.

[File endorsement omitted.]

In United States District Court

Stipulation—Filed June 26, 1944

It is hereby stipulated and agreed by and between the United States of America, plaintiff herein, the Champlin Refining Company, defendant herein, and the State of Oklahoma ex rel. Commissioners of the land office, intervener herein, that in the event the judgment is rendered in the above-entitled cause of action, to-wit: No. 1044 Civil, United States District Court for the Northern District of Oklahoma, adverse to the claim of title by the United States of America in behalf of the Indian wards herein, that the defendant Champlin Refining Company, and the intervener, State of Oklahoma, will not assert the judgment entered in this cause to be res adjudicata of any future action which may or might be brought by the United States of America for its own benefit as claiming title in the United States of America, as distinguished from the title of the United States of America for the benefit of the restricted Indian wards set out in the complaint herein.

Randell S. Cobb, Attorney General, State of Oklahoma. Walter Marlin, Attorney for School Land Commission. Nathan Scarritt, E. S. Champlin, Attorneys for Defendant, Champlin Refining Company. Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma. —— ——, Assistant Attorney General of the United States.

The foregoing stipulation and agreement entered into by [fol. 39] and between all of said parties in said action, is this 26th day of June, 1944 approved and confirmed.

Royce H. Savage, United States District Judge.

[File endorsement omitted.]

In United States District Court

Order Overruling Plaintiff's Motion for Summary Judgment—Filed August 10, 1944

Now on this 8th day of August, 1944, this matter having been heretofore assigned for oral argument, and having been argued by counsel appearing for the United States of America, Plaintiff, and counsel appearing for the State of Oklahoma, Intervener, and the Champlin Refining Company, Defendant, and the Court being otherwise fully advised in the premises, finds that said motion should be denied and overruled.

Wherefore, It Is Ordered, Adjudged and Decreed that Plaintiff's motion for summary judgment be, and the same is hereby overruled and denied.

Royce H. Savage, Judge.

[File endorsement omitted.]

In United States District Court

Plaintiff's Requested Findings of Fact and Conclusions of Law—Filed September 5, 1944

Findings of Fact

I

That this action was brought by the United States, through the Attorney General at the request of the Secretary of the Interior, in its own behalf and in behalf of and as guardian of the restricted Indians hereinafter mentioned.

II

That the defendant Champlin Refining Company is a cor-
[fol. 40] poration organized under the laws of the State of New Mexico, authorized to do business and doing business in the State of Oklahoma and was duly served with process. That the State of Oklahoma, on the relation of the Commissioners of the Land Office, was permitted to intervene.

III

That in accordance with the treaties of May 6, 1828, 7 Stat. 311, February 14, 1833, 7 Stat. 414, and Decem-

ber 29, 1835, 7 Stat. 478, the United States conveyed to the Cherokee Nation by deed dated December 31, 1838, a large tract of land in Northern Oklahoma, including the land on both sides and the bed of the Arkansas River at the locations in suit.

IV

That by Treaty of July 19, 1866, 14 Stat. 799, the Cherokee Nation agreed that the United States might settle friendly Indians upon that part of their lands known as the Cherokee Outlet. That the Sixteenth Article of the Treaty provided that the lands were to be conveyed to the friendly Indians located thereon and required that the districts on which each group of Indians should be located be in compact form and the boundaries distinctly marked.

V

That by treaty between the United States and the Cheyenne and Arapahoe Indians dated October 28, 1867, 15 Stat. 593, there was set aside for them out of the Cherokee Outlet, a reservation extending from the Arkansas River to the Cimmarron River. By the terms of this treaty, the reservation for the Cheyenne and Arapahoe Indians was expressly extended to the middle of the Arkansas River. That the Cheyenne and Arapahoe Indians decided not to go upon this land and an agreement was obtained from them relinquishing their claim. H. R. Ex. Doc. No. 89, 47th Congress, 1st sess.

VI

That the land along the Arkansas River on both sides of the river at the locations in question, was first surveyed into sections, townships and ranges in September, 1872.

[fol. 41] VII

That in accordance with the 1866 Treaty with the Cherokee Nation and pursuant to authority contained in the Act of March 3, 1881, 21 Stat. 380, the Secretary of the Interior on the 25th day of June, 1881, designated and assigned for the use and occupation of the confederated Otoe and Missouria Tribe of Indians:

That portion of Tp. 23 N., R. 3 E lying West of the Arkansas River (and other townships not involved in this suit.)

VIII

That pursuant to the 1866 Treaty with the Cherokee Nation and pursuant to the authority granted by the Act of March 3, 1883, 22 Stat. 603, 624, the Cherokee Nation, for a valuable consideration by its duly authorized officials on the fourteenth day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Otoe and Missouria Indians:

Fractional township 23 North, Range 3 East of the Indian Meridian (lying and being on the right bank of the Arkansas River, according to the plat annexed) (and other townships not included in this suit).

IX

That by the Act of April 10, 1876, 19 Stat. 28, there was set aside as a reservation for the use and occupation of the Pawnee Tribe of Indians

All that tract of country between the Cimmarron and Arkansas Rivers embraced within the limits of Township 23 North, of Range 3 East (together with other townships) of the Indian Meridian

provided that the terms of the Sixteenth Article of the Cherokee Treaty of 1866 were to be complied with so far as the same might be applicable.

X

That in accordance with the 1866 Treaty with the Cherokee Nation, and pursuant to the authority contained in the [fol. 42] Act of March 3, 1883, 22 Stat. 603, 624, the Cherokee Nation, for a valuable consideration by its duly authorized officials on the fourteenth day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Pawnee Tribe of Indians:

"Fractional township 23 North, Range 4 East of the Indian Meridian (and other townships not involved in this suit) "the fractional townships being on the right bank of the Arkansas River."

XI

That the Treaty of 1867 with the Cheyenne and Arapahoe Indians expressly included in the reservation created for those Indians the south half of the bed of the Arkansas River. That in the creation of the reservations for the Pawnee and for the Otoe and Missouria Indians, the river bed was neither expressly included in nor excluded from the lands set aside for the Indians.

XII

That on the ninth day of October, 1893, a trust patent was issued to Horace Fields, an Indian of the Pawnee Tribe, being Allottee No. 28, covering the following described land:

The SE¼ of NW¼ and Lots 1, 2 and 3 of Section 19, Township 23 N. of Range 4 East of the Indian Meridian in Oklahoma, containing 121.66 acres.

That thereafter the allottee Horace Fields died and his heirs were determined by the Department of the Interior to be his wife, Eva R. Weeks and his son, Arthur Fields, each of whom took a one-half interest in and to said allotment.

That thereafter by deed duly approved by the Department of the Interior on June 13, 1922, Eva R. Weeks conveyed a one-fourth interest in the allotment of Horace Fields to Arthur Fields. That Eva R. Weeks thereafter died and her heirs were determined by the Department of the Interior to be:

Anna Barker, Jennie Davis, Lena Brown, Arthur Fields, each of whom received a one-fourth interest in the estate of Eva R. Weeks. That the title to the real estate above de- [fol. 43] scribed is now held in trust and was so held on the twentieth day of July, 1942 and prior thereto by the United States of America in trust for the following Indians in the proportionate interests set opposite their names:

Arthur Fields	13/16
Anna Barker	1/16
Jennie Davis	1/16
Lena Brown	1/16

XIII

That on the ninth day of October, 1893, a trust patent was issued to William Bayhylle, an Indian of the Pawnee Tribe,

being Allottee No. 302, covering the following described real estate:

The W½ of NE¼ of Sec. 20 and the SW¼ of SE¼ and Lot 6 of Sec. 17, Twp. 23 N. of R. 4 E. of the Indian Meridian in Oklahoma containing 129 acres.

That the said William Bayhylle died on or about the 26th day of April, and his heirs were determined by the Department of the Interior to be as follows:

Kittie Bayhylle, wife	7/21
Edward Bayhylle, son	2/21
Daniel Bayhylle, son	2/21
Elijah Bayhylle, son	2/21
Violet Rappuie, daughter	2/21
William Bayhylle, Jr., son	2/21
Louis Bayhylle, son	2/21
Elmer Bayhylle, son	2/21

That thereafter Elijah Bayhylle died and Kittie Bayhylle was determined by the Department of the Interior to be his sole heir; that thereafter on or about the eighteenth day of August, 1940, Kittie Bayhylle died and her heirs were determined by the department of the Interior to be as follows:

[fol. 44] Daniel Bayhylle, son	2/12
Violet Bayhylle, daughter	2/12
William R. Bayhylle, son	2/12
Louis D. Bayhylle, son	2/12
Elmer Bayhylle, son	2/12
Perry W. Moore, grandson,	1/12
Lucille M. Moore, granddaughter	1/12

That the title to the real estate above described allotted to William Bayhylle, of which only

Lot 6 and the SW¼ of the SE¼ of Sec. 17, Twp. 23 N. of R. 4 E. of the Indian Meridian

is herein involved is now held in trust by the United States of America for the following heirs to the estate of William Bayhylle:

Edward Bayhylle	3/84
Daniel Bayhylle	14/84
Violet Bayhylle	14/84

William R. Bayhylle	14/84
Louis D. Bayhylle	14/84
Elmer Bayhylle	14/84
Perry W. Moore	3/84
Lucille M. Moore	3/84

XIV

That on the twenty-fourth day of November, 1906, a trust patent was issued to Ethel Lewis Barnes, an Indian of the Otoe Tribe, being Allottee No. 454, covering the following described real estate:

The S½ of SE¼ and the NE¼ of SE¼ and Lot 5 of Sec. 24 in Twp. 23 N. of R. 3 E. of the Indian Meridian in Oklahoma, containing 152.20 acres.

That the title to the above-described real estate so allotted to Ethel Lewis Barnes of which only

Lot 5 of Sec. 24 in Twp. 23 N. of R. 3 E. of the Indian Meridian in Oklahoma,

is involved herein, is now held in trust by the United States of America for the said allottee Ethel Lewis Barnes.

[fol. 45] XV

That on the tenth day of June, 1907, a trust patent was issued to Anna Robedeaux, an Indian of the Otoe Tribe, being Allottee No. 409-A, covering the following described real estate:

The W½ of SE¼ and the SE¼ of SE¼ of Sec. 1 and the SW¼ of NE¼ of Sec. 13 in Twp. 22 N. of R. 1 E. and Lot 6 of Sec. 24 in Twp. 23 N. of R. 3 E. of the Indian Meridian in Oklahoma, containing 205.45 Acres.

That the said Anna Robedeaux died on or about June 4, 1933, and her heirs were determined by the Department of the Interior to be

Belle Robedeaux, Pearl Robedeaux, Mary Robedeaux, Naomi Robedeaux,

each of whom received a one-fourth interest in and to the above-described real estate allotted to the said Anna Robedeaux; that thereafter Belle Robedeaux died and her heirs were determined by the Department of the Interior to be:

William Burgess, Dewey W. Daily, Esther Burgess, Earl Burgess, Lucy Burgess, Annie Burgess, Curtis F. Burgess,

each of whom inherited a one-seventh interest in and to the estate of Belle Robedeaux. That the title to the real estate above described allotted to Anna Robedeaux, of which only

Lot 6 of Sec. 24 in Twp. 23 N. of R. 3 E. of the Indian Meridian, in Oklahoma,

is herein involved, is now held in trust by the United States of America for the following heirs of Anna Robedeaux:

Pearl Robedeaux	9/36
Mary Robedeaux	9/36
Naomi Robedeaux	9/36
William Burgess	3/36
Dewey W. Daily	1/36
Esther Burgess	1/36
Earl Burgess	1/36
Lucy Burgess	1/36
Annie Burgess	1/36
Curtis F. Burgess	1/36

[fol. 46]

XVI

That there was issued to each of the allottees a trust patent as authorized by Section 5 of the Act of February 8, 1887, 24 Stat. 388, which provided that the United States would hold the allotments in trust for twenty-five years for the use and benefit of the respective allottees and the heirs of the deceased allottees. That under authority contained in Section 5 of the Act of February 8, 1887, by Executive Orders, the trust periods have been extended, and the United States continues to hold the lands allotted to the various allottees named in the foregoing paragraphs in trust for said allottees or their heirs.

XVII

It was the object and purpose of the United States and its intention in creating the Pawnee Indian Reservation, the Otoe and Missouria Indian Reservation, and in making allotments in severalty to members of these tribes, that all conveyances of lands along the Arkansas River should extend to the middle of said river and should include the south half of the river bed.

XVIII

That on or about July 20, 1942, the Commissioners of the Land Office of the State of Oklahoma, purporting to act under and in pursuance of the authority of the State of Oklahoma, executed two oil and gas leases covering the South half of the bed of the Arkansas River where it flows through the Pawnee and Otoe and Missouria Indian Reservations. That both of the purported leases were executed without the authority or consent of the plaintiff herein or the allottees or the heirs of deceased allottees of the lands herein involved and without the consent or approval of the Secretary of the Interior.

XIX

That the Arkansas River at all points in question in this litigation and at all times herein material is not navigable in fact. That the navigability of the Arkansas River at the time and at the places herein involved has been adjudicated in the case of United States v. Brewer-Elliott Oil and Gas [fol. 47] Co., No. 75 Equity, United States District Court for the Western District of Oklahoma, affirmed by the Circuit Court of Appeals for the Eighth Circuit in Brewer-Elliott Oil and Gas Co. v. United States, 270 Fed. 100 (1920), and also affirmed by the Supreme Court of the United States in Brewer-Elliot Oil and Gas Co. v. United States, 260 U. S. 77 (1922), in which suit the United States and the State of Oklahoma, grantor in the oil and gas leases to the Champlin Refining Company, were parties. In said litigation it was determined that the Arkansas River at the times and at all places herein involved, was not navigable in law or in fact.

XX

That all the material allegations of the complaint have been sustained by competent proof.

XXI

That the lands allotted as set forth in findings of fact XII, XIII, XIV and XV are described by legal subdivision in accordance with the Government survey. Such lands are situated on the south bank of the Arkansas River.

XXII

That prior to the conveyances by the Cherokee Nation to the United States in trust for the Pawnee Tribe and the Otoe and Missouria Indians, the Cherokee Nation had conveyed to the Osage Nation of Indians the land lying on the north bank of the Arkansas River directly opposite the allotments here in controversy. That the conveyance from the Cherokee Nation to the Osage Nation included the north half of the bed of the Arkansas River in accordance with the Act of June 5, 1872, 17 Stat. 228.

From the foregoing findings of fact, the court makes the following

CONCLUSIONS OF LAW

I

That the plaintiff is entitled to a judgment as prayed for in the complaint.

[fol. 48]

II

That this Court has jurisdiction of the defendant Champlin Refining Company and the intervener State of Oklahoma, and of the subject matter of this suit.

III

The construction of all conveyances mentioned in the foregoing findings of fact is a matter to be determined in accordance with federal law.

IV

Under and by virtue of the allotments set forth in paragraphs XII, XIII, XIV and XV of the foregoing findings of fact, the lands there described are and at all times here material have been held in trust by the United States for the use and benefit of the allottees and the heirs of the deceased allottees, in accordance with the Act of February 8, 1887, 24 Stat. 388, and other applicable law.

V

That the case of United States v. Brewer-Elliott Oil and Gas Co., No. 75 Equity, Western District of Oklahoma, affirmed by the Circuit Court of Appeals for the Eighth Cir-

cuit in Brewster-Elliott Oil and Gas Co. v. United States, 270 Fed. 100 (1920), and also affirmed by the Supreme Court of the United States in Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77 (1922), adjudicated that the Arkansas River was non-navigable in law and in fact at all times and at all places herein involved. That the judgment in that case determining that the Arkansas River is non-navigable is res judicata as to all parties to this action and they are bound thereby.

VI

That the reservation created for the Otoe and Missouria Indians by the order of the Secretary of the Interior dated June 25, 1881, extended to the middle of the Arkansas River and included the south half of the bed of the river.

VII

That the reservation conveyed by the Cherokee Nation to the United States in trust for the Otoe and Missouria [fol. 49] Tribe by deed dated June 14, 1883, extended to the middle of the Arkansas River and included the south half of the bed of the river.

VIII

That the reservation set aside for the Pawnee Indians by the Act of April 10, 1876, 19 Stat. 29, extended to the middle of the Arkansas River and included the south half of the bed of the river.

IX

That the reservation conveyed by the Cherokee Nation to the United States of America in trust for the Pawnee Indians by deed dated June 14, 1883, extended to the middle of the Arkansas River and included the south half of the bed of the river.

X

That the allotments to the Pawnee and Otoe and Missouria Indians described in Paragraphs XII, XIII, XIV and XV of the foregoing findings of fact each extended to the middle of the Arkansas River.

XI

That the State of Oklahoma does not now have and never has had any right, title or interest in any part of the bed of the Arkansas River at any of the locations involved in this suit.

XII

That the plaintiff is entitled to have its title and the title of its Indian wards in and to each of the allotments described in Paragraphs XII, XIII, XIV, and XV of the foregoing findings of fact quieted and confirmed and the plaintiff is entitled to a judgment declaring that said allotments extended to the middle of the main channel of the Arkansas River.

The defendant Champlin Refining Company and the intervener, State of Oklahoma have no right, title or interest [fol. 50] in and to the bed of the Arkansas River at the locations involved in this suit and each of them should be enjoined from asserting any claim or title to said lands and from interfering with the use and occupation of said lands by the plaintiff.

Whit Y. Mauzy, United States Attorney; Wm. Knight Powers, Assistant United States Attorney, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Stipulation—Filed September 16, 1944

It is stipulated and agreed that it shall be considered that the plaintiff has introduced evidence in the above entitled action showing that the Arkansas River is not navigable in fact at the places in question, on all material dates in this controversy.

It is further stipulated and agreed that it shall be considered that the defendant and intervener have not introduced any evidence on the question of navigability, and that they have objected to the plaintiff's evidence on the ground that such evidence is irrelevant and immaterial because the finding and rule of property announced by the Supreme

Court of Oklahoma in State v. Nolegs, 40 Okla. 479, are binding upon the court in the present action.

It is further stipulated that for the purpose of this case the meander line of the South shore of the Arkansas River, as shown on the government survey, Defendant's Exhibit "7", shall be construed to represent the true mean high water mark of the said river at all times material in this case; provided however, that this stipulation shall not prejudice the right of any party in this action to litigate [fol. 51] in another action the actual location of the shore of the said river.

Whit Y. Mauzy, United States Attorney; Wm. Knight Powers, Assistant United States Attorney, Attorneys for Plaintiff; Randell S. Cobb, Attorney General, State of Oklahoma; J. Walker Field, Assistant Attorney General, State of Oklahoma; Walter Marlin, Law and Executive Counsel for the Commissioners of the Land Office of the State of Oklahoma, Attorneys for Intervener; Nathan Scarritt, E. S. Champlin, Attorneys for Champlin Refining Company, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed September 16, 1944

It is stipulated and agreed by and between the parties hereto as follows:

The Champlin Refining Company has drilled a well at the location shown on the attached Exhibit "A" which well is now producing oil in commercial quantities.

It is further stipulated that a photograph of the said well and of that portion of the Arkansas River in which it was drilled was taken by Dick McConkay, on June 17, 1944 from a location on the south bank of the Arkansas River, approximately five hundred feet east of the said well; and that if Dick McConkay were present he would testify that the photograph attached hereto as Exhibit "B" is a true and correct photograph of the said well as above described.

It is further stipulated and agreed that the certificates of

Phil R. Hawkins, Chairman of the Board of Administration of the State of Kansas, hereto attached as Exhibit "C", [fol. 52] "D" and "E", respectively, may be introduced in evidence in this action as though the statements therein contained were testified, by him in person.

It is further stipulated that the plaintiff raises no objection as to the form of such evidence, but reserves objections as to all of the evidence herein above described as irrelevant and immaterial.

—— ——, United States Attorney; Wm. Knight Powers, Assistant United States Attorney, Attorneys for Plaintiff; Randell S. Cobb, Attorney General, State of Oklahoma; J. Walker Filed, Assistant Attorney General, State of Oklahoma; Walter Marlin, Law and Executive Counsel for the Commissioners of the Land Office of the State of Oklahoma, Attorneys for Intervener; Nathan Scarritt, E. S. Champlin, Attorneys for Champlin Refining Company, Attorneys for Defendant.

[File endorsement omitted.]

[Exhibit A, map or plat showing tracts Nos. 14 and 15 leased by School Land Commission to Champlin Refining Company, showing Champlin No. 1 river bed well, is identical with exhibit B to the motion for summary judgment which appears at page 35.]

(Here follows 1 Photolithograph, side folio 53-54)

53-54

[fol. 55] EXHIBIT "C" TO STIPULATION

Phil R. Hawkins, Chairman; H. D. Bates, Member

Andrew F. Schoeppel, Governor; C. V. Kincaid, Business Manager

State of Kansas

Board of Administration

Penal Institutions

Topeka

CERTIFICATE

STATE OF KANSAS,
Shawnee County, ss:

Affiant, Phil R. Hawkins, Chairman of Kansas State Board of Administration, deposes and says that the State of Kansas, has leased portions of the bed of the Arkansas River and has the following producing wells on said river being produced by following producers and that the state of Kansas has collected royalty mentioned below which is all deposited to credit of General Revenue of Kansas.

County	*Lessee* & Producer	Production since	Sec. Twp. Rng. &
Reno.	Aldon Gasoline Co-City Service	Dec- 37—$ 266.92,	18, 19, 20T20R4
Rice.	E. C. Mengenbeck-Consolidated Gas Co.	Dec- 39—10075.83,	sw of SE22-21-19
Reno.	Nat. Pet. Co. Derby Oil Co.	Jun- 37—14379.15,	S20T24S, R4W
Barton	Derby Oil Co.	Aug- 40— 3596.53,	SE 36-19-12
Sumner	Shell Pet. Co.	Jun- 37—19739.17,	26.31S.R2E
Barton	Derby Oil Co-Standard Oil Co.	Sept- 39—35893.88,	TWP 20S, R. 11W
Rice.	W. H. Bartlett-Sinclair Pr-MKT Co.	Oct- 43— 859.40,	18, 19 T 20, R. 10W
Rice,	Vickers Petroleum Co.	Mch- 43— 448.80,	S/2 SE, 19-20-10
Rice,	Vickers Petroleum Co.	Jly- 43— 227.44,	NW of SE & NE of SW 19-20-10

[fol. 56] The above figures are correct.

Further affiant sayeth not.

Witness name and official seal this 12th day of June, 1944.

Phil R. Hawkins, Chairman of Board of Administration of State of Kansas. (Seal.)

EXHIBIT "D" TO STIPULATION

Phil R. Hawkins, Chairman; H. D. Bates, Member

Andrew F. Schoeppel, Governor; C. V. Kincaid, Business Manager

State of Kansas

Board of Administration

Penal Institutions

Topeka

August 23, 1944.

STATE OF KANSAS,
County of Shawnee, ss:

I, Phil R. Hawkins, Chairman of the Kansas State Board of Administration, hereby certify that the attached statements concerning leases on Arkansas River in Kansas are correct to the best of my knowledge and belief.

Phil R. Hawkins, Chairman State Board of Administration. (Seal.)

[fols. 57-58]

Non-Producing Leases on Arkansas Riverbed Made by Kansas State Board of Administration and Executive Council, and Which Have Not Expired. (As of Aug. 23, 1944)

Description	County	Acreage	Date Leased	Lessee	Amt. Yrly. Rent
Sec. 31 T. 32-3	Cowley)	216.5	7-21-41	Tulsa Oil Company	$216.50
NW 6 T. 33-3	")				
SE 36 T. 32-2	Sumner)				
NE 1 T. 33-2	")				
30-31 T. 20-14	Barton)	194.7	1-15-41	Cont. Oil Company	$194.70
36 T. 20-15	")				
1-2-3 T. 25-15	Pawnee)				
27-30-34 T. 22-17	Pawnee	553.19	1-25-43	Cont. Oil Company	$553.19
3-4-9-10-11 T. 24-5	Reno	213.	4- 8-43	W. N. Bartlett	$213.00
6-7-8-16 T. 22-7	Reno	189.20	8-13-43	Phillips Pet. Co.	$189.20
E½ 23-22-5	Reno	320	9- 2-43	R. L. Hodge	$320.00
S½ 29 All 32 T. 20-10	Rice	156.55	3-19-43	W. H. Bird and M. J. Boreing	$156.55
11-13-24 T. 25-3	Sedgwick)	180.87	9-30-43	Phillips Pet. Co.	$180.87
18-19 T. 25-2	")				
35-36 T. 24-4	Reno)	185.31	9-30-43	H. D. Hurst	$185.31
1 T. 25-4	")				
6 T. 25-3	Sedgwick)				
18-19-20 T. 21-9	Rice	460.92	12-30-43	Chas. E. Straub	$460.92
S½ 25 All 36 T. 26-1	Sedgwick)	462.27	12-30-43	H. H. Royer	$462.27
1 T. 27-1	")				
32-33-34 T. 12-20	Douglas and Leavenworth	274.05	3- 3-44	J. M. Huber, Corp.	$274.05
1-12-13 T. 35-4	Cowley)	185.60	3-23-44	E. M. Quinn	$185.60
6-7-18 T. 35-5	")				
E½ 16 T. 34-3	")	.50	9- 2-43	John M. Moore	$ 50.00
7-17-18 T. 30-2	Sumner	281.42	3-23-44	R. E. Bending	$281.42

[fols. 59-60]

Description	County	Acreage	Date Leased	Lessee	Rentals Amt. Collected
Btn. No. line 5 T. 28-1 and S. li. 15 T. 28-1	Sedgwick	289.56	3-25-29	Dixie Oil Co.	$289.56
Btn. No. li. 21 T. 33-3 and W. li. 28 T. 33-3	Cowley	176.70	7- 5-29	T. M. Deal	$176.70
Btn. No. li. 36 T. 26-1 and E. li. 12 T. 27-1	Sedgwick	354.	9- 4-28	E. F. Bloss and W. D. Jochems	$354.00
Btn. W. li. 10 T. 26-1 and S. li. 15 T. 26-1	Sedgwick	200.	9- 7-28	Same	$200.00
Btn. W. li. 26 T. 25-2 and E. li. 8 T. 26-1	Sedgwick	.....	8-27-28	Tom C. Johnson	———
Btn. W. li. 9 T. 26-1 and E. li. 4 T. 9-26	Sedgwick	109.	9- 5-28	Hart, Clare, Lee Hal M. Black	$109.00
Btn. W. li. SE¼ 14 T. 26-1 and S. Li. 24 T. 26-1	Sedgwick	180.	8-18-28	Tom Harley	$180.00
Btn. W. li. 6 T. 25-3 and E. li. T. 25-3	Sedgwick	953	9- 7-28	J. A. Vickers	$953.00
Btn. N. li. 25 T. 26-1 and S. li. 25 T. 26-1	Sedgwick	93.20	8-27-28	G. A. Stearns	$ 93.20
Btn. N. li. 27 T. 28-1 and S. li. 35-28-1	Sedgwick	123.50	9-20-30	W. G. Haun	$123.50
Btn. N. li. 22 T. 28-1 & S. li. 22 T. 28-1 &	Sedgwick	112.46	4-15-29	Stearns & Streeter	$112.46

Description	County	Acreage	Date Leased	Lessee	Rentals Amt. Collected
Btn. W. li. 35 T. 28–1 & S. li. 35 T. 28–1	Sedgwick		8–27–28	" " "	$ 1.00 per A.
Btn. E. li. 15 T. 26–1 & E. li. SW¼ T. 26–1	Edwards	1500.	6– 8–28	Amarada Pet. Corp.	$750.00
Btn. N. li. 16 T. 25–19 and S. li. 16 T. 26–20	Cowley & Sumner	166.9	6–16–28	Gideon Coulter	$167.00
Btn. N. li. 31 T. 32–3 and S. li. 6 T. 33–3	Shawnee & Jefferson		12–19–29	A. W. Forrester	$ 1.00 per A.
Twp. 11 R. 16	Sumner	182.40	10–15–30	Trees Oil Co.	$182.40
Btn. W. li. 21 T. 30–2 & S. li. 34 T. 30–2					

[fols. 61-62] EXHIBIT "E" TO STIPULATION

Phil. R. Hawkins, Chairman; H. D. Bates, Member

Andrew F. Schoeppel, Governor; C. V. Kincaid, Business Manager

State of Kansas

Board of Administration

Penal Institutions

Topeka, August 23, 1944.

STATE OF KANSAS,
County of Shawnee, ss:

I, Phil R. Hawkins, Chairman of the Kansas State Board of Administration, hereby certify that the attached statements concerning leases on Arkansas River in Kansas are correct to the best of my knowledge and belief.

Phil R. Hawkins, Chairman, State Board of Administration. (Seal.)

[fols. 63-64]

Non-Producing Leases on Arkansas Riverbed Made by the Kansas State Board of Administration and Executive Council, Which Have Expired. (As of Aug. 23, 1944).

Description	County	Acreage	Date	Lessee	Rentals Amt. Collected
S½ 20—N½ 29 T. 20-10	Rice	140	8 -8-41	Vickers Pet. Company	$140 yearly
N½ 3 T. 22-8 N½ 4 T. 22-8	Rice) ")	112.72	6- 8-36	Continental Oil Co.	$112.72 "
Btn. W. line 20-20-10 and S. line 2&3 T. 20-10	"	836.78	3-26-34	Gulf Oil Company	$836.78 "
Btn. N. line Sec. 1&2 T. 21-15 and S. line 10 T. 21-15	Pawnee	149.	10- 8-30	Derby Oil Company	$149.00 "
Btn. E. line 2 [/1&12] T. 26-20 and S. line 20-21-26	Edwards	230.70	10- 8-30	Derby Oil Company	$230.70 "
Btn. E. line 1&12 T. 20-14 and S. line 36 T. 20-15	Barton	488.40	6-17-30	Derby Oil Company	$488.40 "
Btn. W. line 13&24 T. 23-6 and E. line 24&25 T. 23-6	Reno	94.20	5-16-38	C. E. Penrod	$ 94.20 "
Btn. W. line 14&23 T. 23-6 and E. line 14&23 T. 23-6	Reno	55.80	5-16-38	C. E. Penrod	$ 55.80 "
Btn. E. line 22&27 T. 27-21 and W. line 28&33 T. 27-21	Ford	149.20	9- 1-37	B. F. Tomlin	$149.20 "
Btn. E. line 32 T. 27-22 and W. line 31 T. 27-22	Ford	123.40	9- 1-37	B. F. Tomlin	$123.40 "

Non-Producing Leases on Arkansas Riverbed Made by the Kansas State Board of Administration and Executive Council, Which Have Expired. (As of Aug. 23, 1944).

Description	County	Acreage	Date	Lessee	Rentals Amt. Collected
33&34 T. 27–4	Ford	122.	9- 1-37	B. F. Tomlin	$122.00 "
NW¼ (ex. SE¼) 15 T. 32–4	Cowley	70.	8-24-39	Kan.-Okla. Oil & Gas Co.	$ 70.00 (1 yr. only)
34&35 T. 28–1	Sedgwick	73.	7- 1-37	H. A. Keuneke	$ 73.00
30-31-32 T. 21–8	Rice	151.90	"	"	$151.90
1-2-3-11 T. 29–1	Sedgwick	128.10	"	"	$128.10
25-26 T. 21–9	Rice	100.51	"	"	$100.51
18-19-20 T. 21–9	"	108.20	"	"	$108.20
1-2 T. 22–8	"	89.50	"	"	$ 89.50
8–9 & E½ 16 T. 34–3	Cowley	319.35	"	"	$319.35
6-7-8 T. 22–7	Reno	140.20	"	"	$140.20
S½ 35&36 T. 25–2 and N½ 1-2 T. 26–2	Sedgwick	476.69	6-28-37	Phillips Pet. Company	$476.69
22-23 T. 34–3	Cowley	63.20	9-24-37	Chester Westfall	$ 63.20
15 T. 34–3	"	41.40	4-29-40	W. M. McKnab	$ 41.40
SE¼ 29 T. 20–10	Rice	54.90	12-19-41	Paul W. Fleeger	$ 54.90
Btn. E. line T. 24–36 and W. line 11 T. 25–37	Kearny	500.20	1-10-38	Standard Oil & Gas Co.	$500.20

* Matter in Brackets, struck out in copy.

[fol. 65] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed December 21, 1944

The Court makes and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

This action is brought by the United States by the Attorney General at the request of the Secretary of the Interior in behalf of and as guardian of the restricted Indians hereinafter mentioned.

II

The defendant Champlin Refining Company is a corporation organized under the laws of the State of New Mexico, authorized to do business and doing business in the State of Oklahoma, and was duly served with process. The State of Oklahoma, on relation of the Commissioners of the Land Office, was permitted to intervene.

III

Chain of Title to the Arkansas River Bed at the Places in Question

(a) The United States of America originally acquired title to the land involved in this proceeding as a part of the Louisiana Purchase in 1803.

(b) In accordance with the treaties of May 6, 1828, (7 Stat. 311), February 14, 1833, (7 Stat. 414), and December 29, 1835 (7 Stat. 478), the United States conveyed to the Cherokee Nation, by deed dated December 31, 1938, a large tract of land in Northern Oklahoma, including the land on both sides and the bed of the Arkansas River at the locations in suit.

(c) By treaty of July 19, 1866 (14 Stat. 799), the Cherokee Nation agreed that the United States might settle friendly Indians upon that part of their lands known as the Cherokee Outlet. The Sixteenth Article of the treaty provided that the lands were to be conveyed to the friendly In-

dians located thereon and required that the districts on which each group of Indians should be located be in compact form and the boundaries distinctly marked.

[fol. 66] (d) By treaty between the United States and the Cheyenne and Arapahoe Indians, dated October 28, 1867 (15 Stat. 593), there was set aside for them out of the Cherokee Outlet, a reservation extending from the Arkansas River to the Cimarron River. By the terms of this treaty, the reservation for the Cheyenne and Arapahoe Indians was expressly extended to the middle of the Arkansas River. The Cheyenne and Arapahoe Indians decided not to go upon this land and an agreement was obtained from them relinquishing their claim. H. R. Ex. Doc. No. 89, 47th Congress, 1st sess.

(e) Pursuant to the treaty of 1866, Congress by Statute of June 5, 1872 (17 Stat. 228), authorized the Cherokee Nation to convey to the Osage Nation a tract of land described as:

"Bounded * * * on the south and west by the north line of the Creek Country and the main channel of the Arkansas River * * *."

(f) In accordance with the treaty of 1866 with the Cherokee Nation and pursuant to authority contained in the Act of March 3, 1881 (21 Stat. 380), the Secretary of the Interior, on the 25th day of June, 1881, designated and assigned for the use and occupation of the confederated Otoe and Missouria Tribe of Indians:

"That portion of tp. 23 N., R. 3 E., lying West of the Arkansas River (and other townships not involved in this suit)."

(g) Pursuant to the treaty of 1866 with the Cherokee Nation and pursuant to the authority granted by the Act of March 3, 1883 (22 Stat. 603, 624), the Cherokee Nation, on the 14th day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Otoe and Missouria Indians:

Fractional township 23 North, Range 3 East of the Indian Meridian (lying and being on the right bank of the Arkansas

River, according to the plat annexed) (and other townships not included in this suit).

[fol. 67] (h) By the Act of April 10, 1876 (19 Stat. 28), there was set aside as a reservation for the use and occupation of the Pawnee Tribe of Indians:

All that tract of country between the Cimarron and Arkansas Rivers embraced within the limits of Township 23 North of Range 3 East (together with other townships) of the Indian Meridian,

provided that the terms of the Sixteenth Article of the Cherokee Treaty of 1866 were to be complied with so far as applicable.

(i) In accordance with the treaty of 1866 with the Cherokee Nation and pursuant to the authority contained in the Act of March 3, 1883 (22 Stat. 603, 624), the Cherokee Nation, on the 14th day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Pawnee Tribe of Indians:

Fractional township 23 North, Range 4 East of the Indian Meridian (and other townships not involved in this suit) the fractional townships being on the right bank of the Arkansas River.

IV

Title of the Riparian Restricted Indian Patents

(a) On October 9, 1893, a trust patent was issued covering the following described land:

Southeast Quarter of Northwest Quarter and Lots 1, 2 and 3, of Section 19, Township 23 North, Range 4 East of the Indian Meridian in Oklahoma, containing 121.66 acres, and title is now held in trust by the United States for the Indians in the proportionate interests set opposite their names:

Arthur Fields	13/16
Anna Barker	1/16
Jennie Davis	1/16
Lena Brown	1/16

(b) On October 9, 1893, a trust patent was issued covering the following described land:

Lot 6 and Southwest Quarter of Southeast Quarter of [fol. 68] Section 17, Township 23 North, Range 4 East of the Indian Meridian,

and title is now held in trust by the United States for the heirs in the proportionate interests set opposite their names:

Edward Bayhylle	3/84
Daniel Bayhylle	14/84
Violet Bayhylle	14/84
William R. Bayhylle	14/84
Louis D. Bayhylle	14/84
Elmer Bayhylle	14/84
Perry W. Moore	3/84
Lucille M. Moore	3/84

(c) On November 24, 1906, a trust patent was issued covering the following described land:

Lot 5 of Section 24, Township 23 North, Range 3 East of the Indian Meridian in Oklahoma,

and title is now held in trust by the United States for the following named Indian:

Ethel Lewis Barnes.

(d) On June 10, 1907, a trust patent was issued covering the following described land:

Lot 6 of Section 24, Township 23 North, Range 3 East of the Indian Meridian in Oklahoma,

and title is now held in trust by the United States of America for the Indians in the proportionate interests set opposite their names:

Pearl Robedeaux	9/36
Mary Robedeaux	9/36
Naomi Robedeaux	9/36
William Burgess	3/36
Dewey W. Daily	1/36
Esther Burgess	1/36
Earl Burgess	1/36
Lucy Burgess	1/36
Annie Burgess	1/36
Curtis F. Burgess	1/36

[fol. 69] All of the foregoing real estate was issued to each allottee by a trust patent as authorized by Section 5 of the Act of February 8, 1887 (24 Stat. 388), which provided that the United States would hold the allotments in trust for twenty-five years for the use and benefit of the respective allottees and their heirs. Under authority contained in Section 5 of the Act of February 8, 1887, by Executive Orders, the trust periods have been extended and the United States continues to hold the lands allotted in trust for the foregoing named restricted Indians. All of such lands are situated on the south bank of the Arkansas River.

V

In all of such reservations, grants and conveyances the bed of the Arkansas River itself was neither expressly included or excluded from the lands set aside for the Indians.

VI

The land along the Arkansas River on both sides of the river at the location in question was first surveyed into sections, townships and ranges in September, 1872, and such survey approved by the General Land Office on September 16, 1872.

VII

The Arkansas River, at the points in question in this litigation and set at all times herein material, is not navigable in fact.

VIII

On November 16, 1907, the State of Oklahoma was admitted to the Union, and on March 10, 1914, the Supreme Court of the State of Oklahoma, in State v. Nolegs, 40 Okl. 479, took judicial notice of the fact that the Arkansas River is navigable throughout the State and held that the bed thereof is the property of the State of Oklahoma.

IX

On May 28, 1919, the State of Oklahoma enacted a statute, 64 O.S.A., Section 290, by which it was declared that the beds of rivers within the state two chains or more in width are the property of the state. The Arkansas River, at the [fol. 70] locations involved in this action, is more than two chains in width.

X

On July 20, 1942, the State of Oklahoma executed two oil and gas mining leases in favor of Champlin Refining Company covering respectively 281 acres and 157 acres on the south half of the river bed adjoining the Indian allotments in this action. The Champlin Refining Company has drilled a well upon one of said leases and is now producing oil in commercial quantities therefrom.

XI

Ownership of the Arkansas River Bed in Kansas

On April 6, 1912, in Hurst v. Dana, 86 Kan. 947, the Supreme Court of Kansas took judicial notice that the Arkansas River is navigable within that state and held that the bed of the river is the property of the state. The State of Kansas has executed many oil and gas leases covering the river bed. Producing wells have been drilled on such leases and the state has collected all of the rentals and royalties due the lessor thereunder. The title of the State of Kansas to the riverbed has not been questioned by the United States or otherwise. While Hurst v. Dana did not reach the Supreme Court of the United States, a similar conclusion by the Supreme Court of Kansas with respect to the Kansas river, in the case of State v. Akers, 92 Kan. 169, decided on May 18, 1914, was approved by the Supreme Court of the United States in Wear v. Kansas, 245 U. S. 154.

Conclusions of Law

A preliminary statement will indicate the reason for conclusions reached.

Plaintiff relies upon the case of United States v. Brewer-Elliott Oil and Gas Company, 260 U. S. 77. That case involved title to the north half of the bed of the Arkansas River at the approximate point on the stream where we are now concerned with the south half. In that case the United States asserted that title was in the Osage Nation to the main channel of the stream. The Osage Nation having derived title to its reservation from the Act of Congress [fol. 71] of June 5, 1872, wherein the tract conveyed was described as:

"Bounded • • • on the south and west by the north line of the Creek country and the main channel of the Arkansas river • • •."

It was held in that case that the Arkansas River at the point in suit was not navigable in fact and that since the Osage Nation acquired title to the main channel of the stream by an express grant of the United States some thirty-five years prior to the admission of the State of Oklahoma into the Union, that the grantee could not be deprived of its title to such portion of the river bed by a decision of the Supreme Court of the State of Oklahoma declaring the river navigable although non-navigable in fact. It was further held that since the case involved the validity and effect of a grant made by the United States, a federal question was necessarily presented and the navigability of the stream was not a local question for the state tribunals to settle.

But the Brewer-Elliott case may readily be distinguished from the case at bar. At page 89 of the opinion, Mr. Chief Justice Taft says:

"In government patents containing no words showing purpose to define riparian rights, the intention to abide the state law is inferred."

The portion of the river bed involved in this case was not expressly included in the patents issued by the United States. The trust patents issued by the United States under consideration in this case disclose no purpose to define riparian rights which requires a conclusion that the United States assented to their construction according to the local law. The Brewer-Elliott case, supra, citing with approval Wear v. Kansas, 245 U. S. 154, 62 L. Ed. 214, expressly sanctions the practice of some states of retaining title to the beds of streams by adjudging them to be navigable when they are not actually so. The last paragraph of the Brewer-Elliott opinion, on page 89, reads as follows:

"Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not [fol. 72] actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact. In such a case, navigability vel non is not a local question. In Wear v. Kansas, 245 U. S. 154, upon which the appellants

rely, the patent of the United States under which Wear derived title was a grant, made before statehood, of land bordering on the Kansas River without restriction, reservation or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on a navigable stream did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a non-navigable stream, was immaterial. In either view the result there would have been the same. The case of Donnelly v. United States, 228 U. S. 243, is to be similarly distinguished, if, indeed, it can be said after the qualification of the opinion, 228 U. S. 708, 711, to require distinguishing."

It is further urged by the United States that it holds title in trust for its Indian wards and it could not be deprived of such title by determination of navigability by a state court without regard to the fact. If the United States claimed title to the river bed for its own benefit, this would undoubtedly be true. The same question would then be presented that was before the court in United States v. Oregon, 295 U. S. 2, 79 L. Ed. 127, and United States v. Utah, 283 U. S. 64, 75 L. Ed. 849. Absent abandonment by the United States, title to the river bed determined in accordance with the federal law would be in the United States because the river is non-navigable in fact. United States v. Oregon, United States v. Utah, supra. But the United States here urges that its Indian wards have beneficial title to the bed of the stream as riparian owners under the trust patents issued to such Indian wards by the United States. How- [fol. 73] ever, in answer to that, in Oklahoma v. Texas, 258 U. S. 574, the court, at page 594, says:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what it intended. If by treaty or statute or the terms of its patent it has

shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that intention will be controlling; and if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. Where it is disposing of tribal land of Indians under their guardianship the same rules apply." (emphasis supplied.)

The parties herein have filed a stipulation in this case to the effect that the defendant, Champlin Refining Company, and the intervener, State of Oklahoma, will not assert the judgment entered in this case to be res adjudicata of any future action which may or might be brought by the United States of America for its own benefit claiming title in the United States as distinguished from the title of the United States for the benefit of the restricted Indian wards. In view of this stipulation, it cannot be said that the United States claims title to the river bed in this case, except for and on behalf of its Indian wards.

In United States v. Oklahoma Gas & Electric Co., 318 U. S. 206, at page 209, the court said:

"It is well setled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the state where the land lies."

The above statement by the Supreme Court compel- a conclusion that the United States of America intended that its [fol. 74] Indian wards abide by the state law in the measurement of their rights as riparian owners.

It has been suggested that the rights of the riparian owners must be determined in accordance with the local law at the time the trust patents were issued to the Indian allottees; that such patents having been issued prior to statehood the rule of property established by the decision of the Supreme Court of Oklahoma in State v. Nolegs, supra, cannot deprive riparian owners of title to the river bed vesting prior to statehood.

The answer to this contention may be found in Wear v. Kansas, supra. In that case, the patent of the United States under which the riparian owners derived title was a grant made before statehood of land along the shore of the Kansas River. The decision of the Supreme Court of Kansas that title to the river bed was in the State of Kansas was affirmed. The state court took judicial notice of the navigability of the river and refused to hear evidence thereon. Wear v. Kansas appears to be indistinguishable from the case at bar.

I

This Court has jurisdiction of the parties to this suit, including the intervener, State of Oklahoma, and to the subject matter herein.

II

The State of Oklahoma has the sovereign right of defining the riparian titles of private owners to the beds of its rivers, which may be limited to the ownership of the shore and may accomplish this result by declaring its rivers to be navigable, excepting only where title to the river bed has been expressly conveyed by the United States prior to statehood. The determination of these rights is a local question and the federal court must construe such rights in accordance with state law. The decision announced by the Supreme Court of the State of Oklahoma in State v. Nolegs, 40 Okl. 479, is the binding and controlling rule of law in this case.

[fol. 75] III

The State of Oklahoma is the legal title owner of the tracts of land described as:

South Half of the Arkansas river bed at the points in question,

and the Champlin Refining Company has a valid and subsisting oil and gas lease upon such premises and such title held in the State of Oklahoma and in Champlin Refining Company is in all things confirmed and approved.

IV

The United States of America in behalf of its restricted Indian Allottees and their heirs has no right, title or interest in and to the South Half of the Arkansas River bed

at the points in question and their claim to title is hereby denied.

Counsel for defendant and intervener will present to the Court form of decree for entry of judgment on December 29, 1944.

Dated this 21st day of December, 1944.

Royce H. Savage, United States, District Judge.

[File endorsement omitted.]

In United States District Court

Decree—Filed December 29, 1944

On this 29th day of December, 1944, the said cause comes on for decree after having been fully tried and submitted, and upon consideration thereof, it is by the Court,

Ordered, Adjudged and Decreed that the State of Oklahoma is the legal title owner of the South Half of the Arkansas river bed adjoining the parcels of land described in the complaint and the Champlin Refining Company has a valid and subsisting oil and gas lease upon such portion of the river bed and such title held in the State of Oklahoma and in Champlin Refining Company is in all things confirmed and approved.

[fol. 76] It is Further Ordered, Adjudged and Decreed that the United States of America on behalf of its restricted Indian allottees and their heirs has no right, title or interest in and to the South Half of the Arkansas river bed adjoining the parcels of land described by the complaint, and their claim of title thereto is hereby denied.

To the said decree, and every part thereof, and to the above findings and orders the plaintiff at the time excepted and said exceptions are allowed.

Royce H. Savage, United States, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY THE UNITED STATES—Filed March 17, 1945

Notice is hereby given that the United States of America, plaintiff and appellant, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the final judgment and decree entered in this action on December 29, 1944, quieting title to those portions of the Arkansas River bed here involved in the State of Oklahoma, adjudging that defendant Champlin Refining Company has a valid lease upon such portions of the river bed, and decreeing that the United States, in behalf of its restricted Indian allottees and their heirs, has no right, title or interest in such portions of the river bed.

The following parties are appellees:

Champlin Refining Company, a New Mexico corporation.

State of Oklahoma, ex rel. Commissioners of the Land Office.

Whit Y. Mauzy, United States Attorney in and for the Northern District of Oklahoma.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES DISTRICT COURT

ORDER GRANTING AND EXTENDING TIME FOR DOCKETING AND LODGING RECORD ON APPEAL—Filed April 17, 1945

Now on this 17th day of April, 1945, this Motion coming on for hearing for an order extending time in which to allow the United States of America, Appellant in the above entitled case, to docket and lodge the record on appeal in this case in the United States Circuit Court for the Tenth Judicial Circuit, and the Court being fully advised in the premises, finds that said Motion should be, and the same is hereby allowed.

Wherefore, It Is Ordered, Adjudged and Decreed that the plaintiff herein and Appellant, United States of America, be allowed ninety (90) days additional time from March 17, 1945, in which to lodge and docket the record on appeal in this case.

Royce H. Savage, United States, District Judge.

This is to certify that on the 17th day of April, 1945, I deposited in the United States Post Office at Tulsa, Oklahoma, an envelope addressed to each of the following named attorneys appearing and representing the defendant and intervener herein, which envelope each contained a copy of the within and foregoing Order Granting and Extending Time for Docketing and Lodging Record on Appeal filed herein, each envelope being under the postage frank of the Department of Justice:

Mr. Nathan Scarritt, Attorney at Law, Champlin Refining Company, Enid, Oklahoma.

The Attorney General, State of Oklahoma, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Mr. Walter Marlin, Secretary, Oklahoma School Land Commission, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Wm. Knight Powers, Assistant United States Attorney, 335 Federal Building, Tulsa 3, Oklahoma.

[File endorsement omitted.]

[fol. 78] IN UNITED STATES DISTRICT COURT

ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS—Filed April 17, 1945

Upon motion of the United States of America, and good cause therefor appearing,

It is hereby Ordered that the Clerk of this Court transmit to the United States Circuit Court of Appeals for the Tenth Circuit, together with the transcript of record on appeal herein, the original exhibits offered or received in evidence on behalf of all parties to this cause, together with pleading exhibits with instructions to the Clerk of said Circuit Court of Appeals to return said original exhibits to this Court upon rendition of final decision in the cause.

Royce H. Savage, United States, District Judge.

This is to certify that on the 17th day of April, 1945, I deposited in the United States Post Office at Tulsa, Oklahoma, an envelope addressed to each of the following named attorneys appearing and representing the defendant and intervener herein, which envelopes each contained a copy

of the within and foregoing Order for Transmittal of Original Exhibits, each envelope being under the postage frank of the Department of Justice:

Mr. Nathan Scarritt, Attorney at Law, Champlin Refining Company, Enid, Oklahoma.

The Attorney General, State of Oklahoma, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Mr. Walter Marlin, Secretary, Oklahoma School Land Commissioner, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Wm. Knight Powers, Assistant United States Attorney, 335 Federal Building, Tulsa 3, Oklahoma.

[File endorsement omitted.]

[fol. 79] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD ON APPEAL—Filed April 17, 1945

Pursuant to Rule 75(a), Federal Rules of Civil Procedure, the United States of America, appellant herein, hereby designates the following matters to be included in the record on appeal:

(1) Complaint, filed July 13, 1943.

(2) Disclaimer of Champlin Refining Company, an Iowa corporation, filed August 5, 1943.

(3) Answer of Champlin Refining Company, a New Mexico corporation, filed August 5, 1943.

(4) Motion to intervene and intervening answer of State of Oklahoma, ex rel. Commissioners of the Land Office, both filed August 20, 1943.

(5) Order dated August 20, 1943, granting leave to intervene to the State of Oklahoma, ex rel. Commissioners of the Land Office.

(5a) Transcript of proceedings at pre-trial conference on October 15, 1943.

(6) Amendment to answer of defendant Champlin Refining Company dated, October 15, 1943.

(7) Amendment to intervening answer of State of Oklahoma, ex rel. Commissioners of the Land Office, filed October 22, 1943.

(8) Motion of the United States for summary judgment filed November 19, 1943, with attached affidavit, but excluding the plat hereinafter designated as Plaintiff's Exhibit 21, also excluding the opinion, order, and decree of the district court in the case of United States of America v. Brewer-Elliott Oil & Gas Co., No. 75 Equity, which plat, opinion, order, and decree are included in the record on appeal as Plaintiff's Original Exhibits 21, 22, 23, 24.

(9) Affidavit in support of motion for summary judgment, filed December 2, 1943.

(10) Stipulation filed June 26, 1944.

(11) Order overruling plaintiff's motion for summary judgment, filed August 8, 1944.

[fol. 80] (12) Plaintiff's requested findings of fact and conclusions of law, filed September 5, 1944.

(13) Entire transcript of trial proceedings had on September 16, 1944.

(14) Stipulation filed September 16, 1944, to the effect that plaintiff has introduced evidence showing Arkansas River is non-navigable, etc.

(15) Stipulation filed September 16, 1944, re drilling operations of defendant Champlin Refining Company, with attached exhibits.

(16) Findings of fact and conclusions of law filed December 21, 1944.

(17) Decree entered December 29, 1944.

(18) Copy of notice of appeal filed March 17, 1945.

(19) Statement of points on which appellant intends to rely.

(20) All entries appearing on the clerk's docket relating to this proceeding.

(21) Order extending time for docketing record.

(22) Order re original exhibits.

(23) Copy of this designation.

J. Edward Williams, Acting Head, Lands Division. —— ——, United States Attorney, Tulsa, Oklahoma. Vernon L. Wilkinson, Fred W. Smith, Attorneys, Department of Justice.

This is to certify that on the 17th day of April, 1945, I deposited in the United States Post Office at Tulsa, Oklahoma, an envelope addressed to each of the following named attorneys appearing and representing the defendant and intervener herein, which envelopes each contained a copy [fol. 81] of the within and foregoing Designation of Record on Appeal, each envelope being under the postage frank of the Department of Justice:

Mr. Nathan Scarritt, Attorney at Law, Champlin Refining Company, Enid, Oklahoma.

The Attorney General, State of Oklahoma, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Mr. Walter Marlin, Secretary, Oklahoma School Land Commission, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Wm. Knight Powers, Assistant United States Attorney, 335 Federal Building, Tulsa 3, Oklahoma.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS RELIED ON—Filed April 17, 1945

The United States of America, appellant, pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, makes the following statement of points on which it will rely on appeal.

(1) The trial court erred in decreeing that the State of Oklahoma is the owner of legal title to the south half of the bed of the Arkansas River adjoining the parcels of land described in the complaint of the United States.

(2) The trial court erred in decreeing that the defendant Champlin Refining Company has a valid and subsisting oil and gas lease on the portions of the south half of the Arkansas River bed adjoining the parcels of land described in the complaint of the United States.

(3) The trial court erred in decreeing that the United States, on behalf of its restricted Indian allottees and their heirs, has no right, title or interest in and to the south half

of the Arkansas River bed adjoining the parcels of land described by the complaint filed by the United States.

[fol. 82] (4) The trial court erred in concluding that the decision of the Supreme Court of Oklahoma in State v. Nolegs, 40 Okla. 479, to the effect that the Arkansas River is navigable, is binding and controlling on the United States and on the federal district court in this proceeding.

(5) The claim of the State of Oklahoma rests solely upon a contention that the Arkansas River was navigable and that the bed of the river passed to the State as a result of the Act of Congress admitting Oklahoma to the Union; therefore the question of navigability is a federal question, and the trial court erred in holding that it is a state question controlled either by a State judicial determination of navigability or by a State legislative declaration of ownership of river beds.

(6) The patents by the United States to its restricted Indian allottees having been issued prior to statehood, the trial court erred in concluding that the scope of the grants under such patents could be changed by later State judicial determinations or State legislative declarations of navigability, the river being in fact non-navigable at the points in question and at all times here material.

(7) The Arkansas River being nan-navigable in fact at the points in question and at all times material, the trial court erred in not holding that the State of Oklahoma acquired no title to the bed of the Arkansas River upon its admission to the Union.

(8) The Arkansas River being non-navigable in fact at the points in question and at all times here material, the trial court erred in not holding that the trust patents covering the parcels of land described in the complaint embrace the south half of the Arkansas River bed adjoining the parcels in question.

(9) The trial court erred in concluding that the applicable principles of law in cases where the United States claims title in trust for its restricted Indian allottees and their heirs are different than the principles of law applicable in cases where the United States claims title for itself, and erred specifically in holding that in the former class of cases the question of navigability is a state question and

[fol. 83] that the United States Government and federal courts are concluded by a State judicial determination of navigability in a proceeding to which the United States was not a party, or by State statutory declarations of ownership of river beds.

(10) The trial court erred in not holding that the decree in the case of United States v. Brewer-Elliott Oil and Gas Co., No. 75 Equity, District Court of the United States for the Western District of Oklahoma, 249 Fed. 609, is res judicata and binding on the State of Oklahoma and its privy, Champlin Oil Company, and that said decree finally and conclusively determined that the State of Oklahoma has no title to the portions of the Arkansas River bed here in issue.

(11) The trial court erred in denying the motion of the United States for summary judgment.

(12) The trial court erred in not quieting title in the portions of the Arkansas River bed here involved in the United States and its allottees, and in not granting the injunctive relief prayed for by the United States.

J. Edward Williams, Acting Head, Lands Division, Department of Justice; —— ——, United States Attorney, Tulsa, Oklahoma; Vernon L. Wilkinson, Fred W. Smith, Attorneys, Department of Justice, Washington, D. C.

This is to certify that on the 17th day of April, 1945, I deposited in the United States Post Office at Tulsa, Oklahoma, an envelope addressed to each of the following named attorneys appearing and representing the defendant and intervener herein, which envelopes each contained a copy of the within and foregoing Statement of Points Relied On, each envelope being under the postage frank of the Department of Justice:

[fol. 84] Mr. Nathan Scarritt, Attorney at Law, Champlin Refining Company, Enid, Oklahoma.

The Attorney General, State of Oklahoma, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Mr. Walter Marlin, Secretary, Oklahoma School Land Commission, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Wm. Knight Powers, Assistant United States Attorney, 335 Federal Building, Tulsa 3, Oklahoma.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS ON PRE-TRIAL CONFERENCE—Filed April 23, 1945

Be It Remembered that on the 15th day of October, A. D., 1943, in the above-named Court, before the Honorable Royce H. Savage, United States District Judge, the above-styled cause came on regularly for Pre-Trial Conference.

Appearances: Whit Y. Mauzy, Esq., U. S. Attorney, and Wm. Powers, Esq., Asst. U. S. Attorney, Attorneys and Counselors at Law, Tulsa, Oklahoma, For the Plaintiff. Nathan Scarritt, Esq., and E. S. Champlin, Esq., Attorneys and Counselors at Law, Enid, Oklahoma, For the Defendant. J. Walker Field, Esq., Asst. Atty. Gen., and Walter Marlin, Esq., Law and Executive Counsel, Commissioners of the Land Office, Attorneys and Counselors at Law, Oklahoma City, Oklahoma, For the Intervener, State of Oklahoma.

Both sides having announced "ready to proceed", the following proceedings were had, to-wit:

The Court: You may offer the evidence.

[fol. 85] Mr. Powers: We wish to offer in evidence, if Your Honor please, Government's Exhibit A, which is an allotment to William Bayhylle of a portion of Section 17, Range — or Township 23, North, Range 4 East. An allotment deed to Horace Field, as Government's Exhibit 2, which is a portion of Lots in Section 19, Township 23 North, Range 4 East. An allotment deed to Ethel Barnes, which is a portion of Lots in Section 24, Township 23 North, Range 4 East, as Government's Exhibit 3. And Anna Robedeaux, which is a portion of the lands in Section 24, Township 23, Range 3 East, as Government's Exhibit 4.

We thought at first that the Emma Pearson land was included, but upon a check of the lands we found that they did not include it. I have another deed to Anna Robedeaux which I believe is not riparian land.

I believe that's all.

The Court: Do the defendants agree that these allotment deeds may be received in evidence at this time?

Mr. Scarritt: No objection.

The Court: They will be considered in evidence. Anything further, Mr. Powers?

Mr. Powers: Not that we wish to prove at this time except as to the degree of heirship in these cases. We can cover that in the stipulation. I don't care to introduce it in evidence.

The Court: Do you suppose you can dictate a stipulation here into the record now that the parties can agree upon?

Mr. Powers: You can follow those with that map—those allotment deeds.

Mr. Scarritt: Well, now, would the stipulation be any different than the allegations in your petition as to the heirship?

Mr. Powers: No, sir.

Mr. Scarritt: If we agree on it, we had as well just admit the allegations as to heirship in the petition are correct.

[fol. 86] Mr. Powers: And save all the stipulation, yes, sir.

The Court: Well, what about the Intervener, State of Oklahoma? Are you willing to make that agreement?

Mr. Field: We have no information to the contrary and if he would tell us that these proofs establish that fact why——

Mr. Powers: I have these proofs here. It would take considerable amount of time to introduce them into the record. If you would like to examine them personally——

Mr. Field: That is what I was thinking. We could make that stipulation and give us an opportunity before we leave to look them over. I have no reason to believe that they do not correspond to the allottees, and of course I do not question an adjudication by the Secretary if he made it as to this allotment.

Mr. Scarritt: Mr. Marlin makes the suggestion he believes they should be in the record. So far as the bulk of the rec-

ord goes, if it ever comes to printing it, or transcribing it, then we can decide whether they should be taken out, or not. But I cannot see that there would be any damage in putting them in the record—just a mere matter of introduction.

The Court: All right.

Mr. Powers: We offer in evidence, if Your Honor please, Government's Exhibit 5, which is a letter dated June 25, 1881, from the Secretary of Interior to the Commissioner of Indian Affairs, which designates, sets aside the real estate concerned herein as a portion of the Otoe Reservation, withholding a portion of fractional township 23 North, Range 3 East, lying west of the Arkansas River containing 14,098.84 acres. I think you all probably have a similar exhibit.

Government's Exhibit 6 we offer in evidence, the deed between the Cherokee Nation and the Pawnee Tribe of Indians, conveying certain real estate under date of the 14th day of June, 1883, together with a plat of the Pawnee grant. Would you like to see this grant?

We offer in evidence Government's Exhibit 7, which is a certified copy of the original deed made by and between [fol. 87] the Cherokee Tribe of Indians, and the United States of America, in trust for the use and benefit of the Otoe and Missouria Indians under date of June 14, 1883, together with plat showing designated Missouria and Otoe reservations.

We offer in evidence Government's Exhibit No. 8, same being proceedings in the heirship of the estate of William Bayhylle; also containing an order determining heirs of Elijah Bayhylle; also order determining heirs of Katie Bayhylle. Now that is the heirship proceedings in the Bayhylle tract.

We offer in evidence Government's Exhibit No. 9, certified copy of proceedings of the Department of Interior, to determine the heirs of Anna Robedeaux, together with certified copy of the Order Determining Heirs of Belle Daily, formerly Belle Burgess. This is the Robedeaux tract.

If Your Honor please, you might—I might inquire of Your Honor—here you will notice that I have put together and introduced in these exhibits, tacked together——

Mr. Scarritt: The heirships pertaining to different tracts.

Mr. Powers: Yes, different hearings on different individuals, all heirs, all pertaining to the same tract.

This is Government's Exhibit No. 10. I offer in evidence certified copy of the findings of the Department of Interior, approval of heirship, estate of Horace Fields, together with certified copy, records of the Department of the Interior, showing a deed by and between Eva R. Weeks, grantor, as the heir of Horace Fields, to Arthur Fields, a Pawnee Indian, grantee, together with finding and approval of heirship of the Department of the Interior of the Estate of Eva R. Weeks.

Mr. Marlin: Examination of these instruments shows a number of things contained therein about treaties and grants that will be material; that's the reason I think it the better policy to have them regularly introduced.

Mr. Powers: With the purpose to show that the restric-[fol. 88] tions continued as to various Indians contained herein, it will be necessary to show, and offer in evidence, orders made by the various presidents of the United States extending the restrictions as to such Indians.

The Court: That will be true, unless it can be agreed upon.

Mr. Powers: May it be agreed upon by you gentlemen?

The Court: That the Indians who own these several tracts, that the restrictions on the alienation of the tracts involved here have been extended from time to time by various proclamations of the President of the United States.

Mr. Powers: So that they are now restricted Indians.

Mr. Scarritt: Your Honor, I don't doubt but that is true. However, the exhibits are here already, and I wouldn't see any reason that they should not just be placed in evidence.

The Court: All right.

Mr. Powers: I offer in evidence Government's Exhibit No. 11, which is an executive order of President Coolidge under date of August 11, 1925, extending restrictions of the Indians of the Otoe Reservation.

I offer in evidence Government's Exhibit No. 12, executive Order signed by President Herbert Hoover, under date of September 29, 1931, extending the trust period on allotments of Indians of the Otoe and Missouria tribes of Indians.

I offer in evidence Government's Exhibit 13, same being an executive order of president Herbert Hoover, under date of December 30, 1931, extending the trust period on allotments to the Otoe and Missouria Indians.

I offer in evidence Government's Exhibit No. 14, same being an executive order signed by Franklin D. Roosevelt under date of December 20, 1934, extending restrictions to the Otoe Reservation.

I offer in evidence Government's Exhibit No. 15, same being the executive order of Woodrow Wilson, dated March 2, 1918, extending the trust period on the allotments of the Pawnee Tribe of Indians.

[fol. 89] I offer in evidence Government's Exhibit No. 16, same being an executive order signed by President Calvin Coolidge under date of May 29, 1928, extending the restrictions and trust periods of certain allotments of certain Pawnee Indians in the State of Oklahoma.

I offer in evidence Government's Exhibit No. 17, same being an executive order executed by Franklin Delano Roosevelt, under date of September 29, 1937, extending the periods of trust applying to Indian lands generally. This was a general order; didn't apply to any particular tribe.

I offer in evidence Government's Exhibit No. 18, same being an executive order signed by Franklin Delano Roosevelt under date of October 29, 1940, extending the periods of trust applying to Indian lands which would expire in the year 1941.

I offer in evidence Government's Exhibit 19, same being an executive order of Franklin Delano Roosevelt extending the trust period on Indian lands expiring during the calendar year 1942.

I believe that's all.

The Court: May it be agreed, then, that Government's Exhibits 5 to 19 inclusive may be received in evidence at this time without objection on the part of the parties?

Mr. Marlin: Yes, sir.

Mr. Scarritt: Yes, sir.

Mr. Powers: I would like the record to show, if Your Honor please, that in reference to certain exhibits, as to the heirship proceedings, that they are introduced in groups, pertaining to individual allotment tracts concerned in this litigation.

The Court: In other words, you have grouped together as one exhibit——

Mr. Powers: Yes.

The Court: The various heirship proceedings pertaining to one particular tract of land.

Mr. Powers: That is correct.

[fol. 90] Mr. Marlin: Your Honor, may I ask if there is some way by which we can get a photostatic copy of these exhibits?

Mr. Powers: I have no objection at all. Now, there are three of those exhibits which I had planned to attach to a motion in this proceeding. But I had been unable to prepare the exhibits myself. We made up four of these maps and plats which I furnished you this morning—had those made for your use, as well as ours; but I have been unable to get copies of these. They are made on a "ply-film" paper, and I don't know much about that kind of business; I have been unable to get photostat copies of them.

Mr. Marlin: May I ask you if any of those maps or plats are drawn to scale, or would be considered in any way for the purpose of establishing the meander line?

Mr. Powers: No, they are not on such a scale as would show a meander line, I don't think.

Mr. Scarritt: Just off the record; you mean the photostat company says they won't make good copies?

Mr. Powers: No, I talked to the U. S. Geological survey, who prepared that plat there for me, and these others are a little different type.

Mr. Scarritt: I was going to say, we have taken some in our office of about that same——

Mr. Powers: I don't know what you could do with those.

Mr. Scarritt: I think they would take all right.

The Court: Is that all you care to do?

Mr. Powers: That's all the exhibits I care to offer at the present time. I might say this for the purpose of this motion, which will be a motion for summary judgment, that is, a motion on the pleadings; I assume under the statement of counsel this morning that that more or less is their idea of disposition of the case too, without proof. That I would like to have those exhibits withdrawn for the purpose of the motion, but inasmuch as they are in the record I don't see any point in withdrawing them again for that motion.

[fol. 91] The Court: I think your motion for summary judgment may refer to any of the exhibits that have been received in evidence here this morning. It may be considered as having connection with the motion for summary judgment filed by either side.

Do you have some exhibits you want to offer?

Mr. Scarritt: If Your Honor please I might state our theory of the case, if Your Honor would bear with me a moment on that.

The Court: All right.

Mr. Scarritt: We regard this case as merely a question of land titles and boundaries. The law is so well settled by decisions of the Supreme Court from our earliest times up to now that I think there can be no question about the law, which apparently is that when new states were carved out of the public domain that they were entitled to all of the rights and privileges of the thirteen original states; and one of those rights or privileges which was enjoyed by the thirteen original states was the ownership of the beds of the navigable rivers. I think one of the first cases that came up was when Alabama was admitted to the Union. An exhaustive opinion was written as to whether Alabama could acquire title to the navigable rivers and the Court held she could. From that time on it has been an unbroken line of decisions, and it has been the rule that a new state was entitled to the beds of their navigable rivers, and as a corollary to that, that such a state could declare the navigability of their rivers, and that the rights of riparian owners, even through Government patents, would be controlled by the local law, which was pronounced either in the state statutes, or in the state decisions. There is one exception to this rule, and that is that where the United States had legitimately sold and conveyed the beds of the rivers to some other party prior to statehood. So it appears to us that it is—that the law in this case is settled, and merely the question to be decided is the fact whether this portion of the bed of the Arkansas River was sold to some other party prior to statehood or whether it was part of the public domain of the United States at the time Oklahoma entered as a state. If it was a part of the public domain when [fol. 92] Oklahoma entered as a state, then we have no doubt whatever that the bed passed to Oklahoma when it became a state, and the right to declare its navigability passed to Oklahoma when it became a state. If the Government can prove that the United States sold this bed of the river to some Indian Tribe who held it at the time Oklahoma became a state, then of course the Brewer-Elliott decision would apply, and the title would of course belong to the Indian tribe, and the State would not have the right to declare

navigability or the right of riparian owners. In the *Brwer*-Elliott case, the north half of this river had been sold to the Osage tribe, and was owned by the Osage tribe at the time Oklahoma became a state. That being a treaty in which the United States was a party, the United States reserved to itself the right to decide whether the river was navigable, and the right to determine the title to the river bed as a Federal question. If we can show that on the other hand that the south half of the river was a part of the public domain of the United States at the time Oklahoma became a state, then the decisions are unbroken to the effect that it is a question of state law, to be governed by state statutes or state decisions.

Now, that being the case, we would like also to trace title of this portion of the river bed, but we would like to go back just a little farther than the Government did. For the convenience of the Court we have brought a map here which was prepared by Mr. George Rainey, who is an Indian student of some note. The original of this map hangs on the wall of the State Library in Oklahoma City; and it was very helpful, we found to us in making this out. I might just lay it on Your Honor's desk here.

I don't know whether this is necessary for the record or not. We are going to introduce exhibits to prove everything that I have to say. I might just say in brief, this portion in blue was the original grant to the Cherokees in about 1838, including these various colored items which were sold to other tribes later by the Cherokees. In about 1866 it became apparent that the Cherokees were not going to need a great portion of this original tract; and the United States made a treaty with the Cherokees that they could settle friendly Indians on any of these lands which the United States might choose. I think the United States started negotiations with the Pawnees in about 1876, and [fol. 93] set aside the reservation shown here in red for them. However, the actual deed from the Cherokees to the United States, and in trust for the Pawnees, was not made until about 1883.

Mr. Powers: The same date as the Otoe tribe.

Mr. Scarritt: Yes, and the same year, reservation was set aside to the Otoe and Missourias; and the Cherokees deeded the Otoes and Missourias the tract shown here in yellow.

Now, the exhibits which the defendants will introduce and some of which have already been introduced in evidence by the Government, will show that the Act of Congress, the treaties and the deeds themselves by which these reservations were set aside and conveyed to the Pawnees, and the Otoes, were explicit in excluding the river bed, and the river bed did not pass to the Otoes, Missourias or the Pawnees, thus leaving the river bed in the Cherokees. The Pawnees later quit-claimed their entire reservation to the United States, and the Cherokees also issued a deed to the United States covering their entire interest in what is known as the Cherokee Outlet, bounded on the east by the 96th Meridian, on the west by the 100th Meridian, including this strip shown here, which was inclusive of anything that they had retained in the Otoe and Missouri, and Pawnee reservations. And since one of the things which they had retained was the bed of the river, by that act this bed of the river passed to the United States as part of the public domain, and it remained in the United States at the time of the opening, and at the time of the admission of Oklahoma as a state; and that being the case, the river bed passed to Oklahoma, and the right to declare the navigability passed to Oklahoma.

Now, for the defendant's exhibits—might we first ask whether it could be stipulated as to the original conveyance from the United States to the Cherokee Tribe, and I will quote from the Brewer-Elliott decision in the District Court, in which the Court said, "The United States conveyed, pursuant to the agreements and treaties, to the Cherokee Nation in December, 1838, a tract of land which included the lands on both banks of the Arkansas River, and the land [fol. 94] under it." Might we have a stipulation that that is a correct statement of the title at that time?

Mr. Powers: That is not, as a matter of fact, the conveyance. That is that court's interpretation of the conveyance.

Mr. Scarritt: That is correct; that is just a statement of it.

Mr. Powers: I don't see there would be any point making a stipulation to it. It would be a question of this court construing what that conveyance did cover, whether it covered the bed of the river, or not.

Mr. Scarritt: Very well, we will introduce the treaty, then.

I have here Kappler's Indian Affairs, Laws and Treaties, which is a compilation by Mr. Kappler, who was formerly Clerk, I believe of the Senate Committee on Indian Affairs for many years. I think the work is regarded as an authoritative compilation of Indian affairs and treaties. All these exhibits are copied from that book. The book is here for the inspection of Government counsel.

We wish to offer in evidence now, treaty with the Cherokees in 1866, by which the Cherokees agreed that any friendly Indian tribes might be settled upon the territory which was ceded to them by the United States in 1838, as Defendant's Exhibit 2.

Mr. Powers: Does that exhibit cover only Section 16 of that treaty; is that all?

Mr. Scarritt: Yes, it covers the portion which is applicable to this case, that's right.

Mr. Powers: You have it as Article 15; and we have a further article of that treaty which is Article 16, which reads as follows: United States can settle friendly Indians in any part of the Cherokee country west of 96 degrees, to be taken in compact form, in quantity not exceeding 160 acres for each member of each of said tribes therein to be settled, the boundaries of said districts to be distinctly marked, the land taken in fee simple to each of said tribes [fol. 95] to be held in common or by members in severalty as the United States may decide." Now, is that a portion of yours?

Mr. Scarritt: No, that is not.

Mr. Powers: Is your treaty under date of July 19, 1866?

Mr. Scarritt: That is correct.

Mr. Powers: That is Article 16. That must be the succeeding article to the one which you have, Mr. Scarritt.

Mr. Scarritt: Uh huh.

Mr. Powers: I wonder then if we would be permitted to make a copy similar to yours and introduce it as Article 16 of the same treaty then?

Mr. Scarritt: Yes, absolutely.

Our next exhibit in chronological order, Your Honor, is that portion of the Act of Congress of April 10, 1876, by which Congress set aside certain territory within the Cherokee Outlet for the Pawnee Tribe of Indians, as this was the Pawnees only, and in which they describe or reserve all that tract of country between the Cimarron and Arkansas

Rivers embraced within certain townships and ranges which are involved in this case, as Defendant's Exhibit 3.

Our next exhibit is that portion of the Act of March 3, 1881, in which it was indicated that the Otoe and Missouria tribes of Indians should be moved from the States of Kansas and Nebraska to reservations which should be purchased by the United States for their benefit within the State of Oklahoma, as Defendant's Exhibit 4.

Our next exhibit, the letter of the Secretary of the Interior, dated June 25, 1881, setting forth the Otoe and Missouria reservations, has already been introduced by the Government. This letter states the exact number of acres which is contained in the reservation in Township 23 North, Range 3 East, wherein these words are used: "Lying west of the Arkansas River, the exact number of acres, 14,098.84 acres is the number of acres in that township, which was set aside for the Otoes. That has already been introduced by the Government.

The Court: All right.

[fol. 96] Mr. Scarritt: Our next exhibit is that portion of the Act of the 47th Congress of 1883, appropriating the sum of $300,000 out of the treasury to purchase from the Cherokee Nation lands west of the Arkansas River, in trust for the Pawnees, Otoes and Missourias. Your Honor will notice they again use the term "west of the river". Defendant's Exhibit 5.

Our next exhibit is the deed from the Cherokee Nation to the United States in trust for the Otoes, dated June 14, 1883. This exhibit has already been introduced by the Government. However, we have a photostat of the original treaty, whereas the Government's is a typewritten copy. And I believe for that reason I should introduce it. The language of this deed is note-worthy. Bearing in mind that our township and range which we are interested in is 23 North, 3 East, the deed reads that it covers fractional township 23 North, Range 3 East of the Indian Meridian lying and being on the right bank of the Arkansas River. And this deed shows that the total number of acreage in all of the reservation is 129,113.2 acres, which is the same acreage which is set forth in the letter of the Secretary of the Interior, setting aside the reservation. As defendant's Exhibit 6.

I next wish to introduce Your Honor, original government survey of township 23 North, Range 4 East, and

would like permission to withdraw the original since it does not belong to us, and substitute photostatic copy. This is the Government survey dated September 16, 1872. Defendant's Exhibit 7.

Mr. Powers: Is this Range 4 East?

Mr. Scarritt: That's right. This original Government survey shows the original description of the lands which are involved in this case, and shows that they do not extend into the river, but are on the river bank.

We now wish to introduce an original Government survey dated September 16, 1872, covering Township 23 North, Range 3 East, and wish to ask permission to withdraw the original and substitute a photostatic copy. As Defendant's Exhibit 8.

This survey shows the land involved in this case in [fol. 97] Township 23 North, 3 East, shows that the Arkansas River's meander was not surveyed, and that the river land- involved in this case do not extend into the river, but stop at the river bank.

We now have an affidavit of Roy G. Collier, civil engineer for the Champlin Refining Company, which states that he has carefully computed the acreage shown on the exhibit which I have just introduced, and that that portion of township 23 North, range 3 East lying west of the Arkansas River, as shown on the said Government survey contains 14,099.24 acres. This does not include any of the riverbed, and is within a fraction of the amount—a fraction of an acre of the amount which the Secretary of the Interior stated was set aside for the Otoes. Which shows by computation of acreage it was not intended that the Otoes should receive any of the riverbed.

Mr. Powers: Is this computation based on the present banks of the river or the banks of the river as shown on the plats at that time?

Mr. Scarritt: Shown on the acreage figures as shown on the original Government survey.

Mr. Powers: This is made not in accordance with the present river banks, but by the survey.

The Court: It is a computation of the acreage made on the basis of the Government survey which is the previous exhibit offered.

Mr. Scarritt: In other words, the Secretary of the Interior, by the exhibit introduced, a certain amount of acreage of this particular township was set aside for the Otoes.

This exhibit shows that that amount of acreage would exclude the river. Defendant's Exhibit 9.

We now wish to introduce treaty between the Pawnee tribe, and the United States, dated November 23, 1892, by which the Pawnee tribe ceded back to the United States all of their claim and interest in and to the reservation which had previously been set aside for them. This treaty, like the act which set the reservation aside for them, described the country as being between the Cimarron and Arkansas Rivers. Defendant's Exhibit 10.

[fol. 98] Mr. Powers: Do you have a copy of that treaty, Mr. Scarritt?

Mr. Scarritt: Yes. We next wish to introduce Act of Congress of March 3, 1893, by which Congress appropriated the sum of $80,000 to purchase from the Pawnee Tribe the land which was described in the preceding exhibit. This Act states that the lands acquired by the agreement specified in this Act are hereby declared to be a part of the public domain. Defendant's Exhibit 11.

We next wish to introduce a treaty between the Cherokee Nation and the United States dated December 19, 1891, by which the Cherokee Nation ceded to the United States all of its right, title and interest in and to any and all lands which they might have in the so-called Cherokee Outlet which is bounded on the west by the 100th Meridian, on the north by the State of Kansas, on the east by the 96th Meridian, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe reservations. This includes the bed of the Arkansas River which is involved in this case. Defendant's Exhibit 12.

We now wish to introduce that portion of the Act of Congress of March 3, 1893, by which the sum of $295,736 was appropriated for the purchase from the Cherokee Nation of the lands in the Cherokee Outlet which are referred to in the previous exhibit, as Defendant's Exhibit 13.

We now wish to introduce proclamation of the President of the United States, dated August 19, 1893, in which he declared all of the lands purchased from the Cherokees, and from the Pawnees in the Cherokee outlet as a part of the public domain of the United States, as Defendant's Exhibit 14. And this proclamation of the United States—of the President of the United States sets forth very briefly the title of these various portions of that outlet as we understand it.

"Now, therefore, I, Grover Cleveland, President of the——

The Court: I don't believe you need to read that, Mr. Scarritt. Just let the exhibit go in.

Mr. Scarritt: All right. I just might point out, for Your [fol. 99] Honor's convenience, a reference that the President declared this to be public domain of the United States, but excepted from the public domain the part that had been deeded to the Osages, and in doing that, he was careful to say that the Osage country was bounded by the main channel of the Arkansas River, which the Supreme Court says means the middle line. But when he gets to the Otoes he says the line—he says, the lands lying west of the Arkansas River, which are included in fractional township 23 North, Range 3 East, which is a distinction which should be borne in mind, in our opinion, throughout this entire case. And as to the Pawnee tribe, lands, he makes no exception whatsoever.

I should have done this earlier, Your Honor. We have prepared an amendment to our answer, and shown a copy to the Government counsel, which we would like permission at this time to file. We raise anew defense in this amendment. The amendment states briefly that this same river involved in this case runs into the State of Kansas; and that the Supreme Court of the United States has declared that the State of Kansas has the right to declare any rivers in her boundaries are navigable and that according to such rule, the State of Kansas has, by her own State Supreme Court, declared the Arkansas River to be navigable. It has always been recognized to belong to the State, and to apply any different rule to the State of Oklahoma than has always been applied to the State of Kansas would violate the rights of these defendants under the equal-protection-of-the-law clause of the Constitution of the United States.

The Court: The amendment may be filed.

Mr. Field: May I, at this time, ask permission of the State on behalf of the School land Commission to file a similar amendment within five days?

The Court: Yes, sir.

Mr. Scarritt: Now, in keeping with this amendment, we wish to offer a certificate from Phil R. Hawkins, Chairman of the Board of Administration of the State of Kansas, to the effect that he is the official that has custody of all the

records of the State of Kansas relevant to oil and gas leases [fol. 100] covering the bed of the Arkansas River; that the State of Kansas has issued many oil and gas leases covering the bed of said river, naming the counties in which such leases are located, and further certifying that production of oil and gas has been obtained from such leases, naming the companies which have obtained such production; and that the State of Kansas has at all times received all oil and gas royalties and rentals from the lands described in the certificate lying and being in the bed of the Arkansas River. As Defendant's Exhibit 15.

Mr. Powers: I don't think it is competent, if Your Honor please, here, and object to its introduction.

The Court: Just a minute; let it be marked as an Exhibit so we will know what we are talking about. Make a notation of the number. We will rule on it later. Make a notation of any exhibits you want to object to, and make the record when we get through with the offer. Is that all?

Mr. Scarritt: That's all we have to offer at this time.

The Court: Now, do I understand that the Government offers no objection to the introduction of any of these exhibits at this time?

Mr. Powers: I assume they are correct, Your Honor.

The Court: At this time, except that you do object to Exhibit 15, upon the ground that it is not material to any issue in the case; is that right?

Mr. Powers: That's correct.

The Court: I assume that in making your objection to Exhibit 15, you don't base it on the fact that the proof sought to be—the fact sought to be established, by the affidavit——

Mr. Powers: Yes, if Your Honor please.

The Court: Rather than in the form of an affidavit?

Mr. Powers: If Your Honor please, but this exhibit purports to show that certain lands are within the limits of the bed of the Arkansas River within the State of Kansas, which there is no showing that this board is such that he [fol. 101] could properly describe, or ascertain whether or not such lands were within the bed of the Arkansas River. I think it is incompetent; I think it is immaterial. I think there is no predicate shown for its admission, as to its proof of correction.

The Court: Of course that type of proof cannot be made by affidavit in the event you object to it being made in that fashion. Of course I would have to sustain your objection.

Mr. Scarritt: We can go to Topeka and take his *deposition*, or have the party here to testify.

The Court: Or have the party here to testify. That is the reason I wanted to know if your objection is based solely upon the question of materiality.

Mr. Scarritt: As to qualification, the affiant states he is Chairman of the Board of Administration which has complete charge and custody of all oil and gas leases of the State of Kansas covering the bed of the Arkansas River. I think on depositions he wouldn't have to say anything more, perhaps, to make his testimony admissible.

The Court: I would suggest this: If you care to make any investigation to determine whether the facts sworn to in the affidavit are true and correct, you might do that. And if you find that the facts are as stated in the affidavit, then you could limit your objection to the question of materiality, and that would obviate the necessity of taking depositions.

Mr. Powers: I am familiar enough with the rule of Wier versus Kansas that the bed of the Arkansas River throughout the length and breadth of the State of Kansas has been ruled and held to be so by the Supreme Court of the United States, but—probably upon deposition that same statement would be made. So I will just reserve my objection to its competency and materiality.

The Court: You object to the exhibit solely upon the theory it is not material to any issue in the case.

Mr. Powers: That is correct.

The Court: I will overrule that objection. I may at a later date conclude that it is not material. If I do, of course [fol. 102] it won't be considered. But for the present I will overrule the objection.

Mr. Powers: Exception.

Mr. Scarritt: Your Honor, I want to make one statement: That all exhibits which have been offered were offered by both Champlin Refining Company, and the State of Oklahoma.

The Court: Yes, all right, I understand that. As I understand you, Mr. Powers, you propose to file a motion for summary judgment upon behalf of the Government.

Mr. Powers: If Your Honor please, that was prior—prior to hearing the statement of counsel this morning. I still think that that would be my inclination, but I would like to, at this time, if you will allow us, to discuss back and forth and see if I have correctly caught his theory as he stated his lawsuit. In the beginning, I believe you made the statement that the navigability or non-navigability of the river, so far as the theory of their lawsuit is concerned, is immaterial.

Mr. Scarritt: No, I didn't make any such statement.

Mr. Powers: You claim the title to the real estate was by reason of the delineation of the actual grants to those various tribes of Indians which surrendered their grants being on the west bank of the Arkansas River; that the bed of the river has never been granted, but was still in the public domain, is that correct?

Mr. Scarritt: That much is correct.

Mr. Powers: What was your statement with reference to the navigability?

Mr. Scarritt: Our statement with reference to navigability was merely that we could offer no proof as to navigability since in our theory of the case that has been conclusively settled by the decision of the State v. Nolegs.

Mr. Powers: Well, I see. Well, under that statement, we will proceed, then, if Your Honor please, to file motion for summary judgment, I believe, at which time the Court can dispose of certain legal aspects of the case which we [fol. 103] think are controlling. It might be that of course at a later date that if we were overruled in our motion for summary judgment it would be necessary to offer proof as to the navigability of the river, depending on the court's consideration of the effect of State versus Nolegs decision.

The Court: Am I to understand that there will be no evidence offered by the defendants to controvert the facts which are sought to be established by the plaintiff by the introduction of these exhibits that have been introduced here this morning; and further, that there will be no evidence offered by the Government to controvert the facts sought to be established by the defendant and the intervener as a result of these exhibits introduced here this morning?

Mr. Scarritt: That's right.

The Court: The purpose of introducing the exhibits at this time on the pre-trial hearing is to get into the record the formal proof necessary to be put into the record by the

parties and about which there will be no disputed controversies so far as the facts are concerned.

Mr. Scarritt: Your Honor, I have overlooked one matter here. I think as we are relying upon the law as proclaimed in the State v. Nolegs as a rule of property of the State, that we should have a stipulation that that decision, as it appears in 40 Oklahoma 479, 139 Pacific 943, should be considered as evidence in this case.

The Court: You will agree to that?

Mr. Powers: Yes. At the same time I will have a request concerning the decision and decree in the Brewer-Elliott decision in the 75 Equity, and also the order of the Court which made the facts set up in the written opinion the findings of fact of the Court.

Mr. Scarritt: That is agreeable.

Mr. Powers: It is taken from the transcript.

Mr. Scarritt: That is agreeable.

The Court: That is agreeable.

Mr. Scarritt: Then, I have one other request to support [fol. 104] the amendment which has been introduced this morning, that the decision of the Supreme Court of Kansas in Hurst v. Dana, 86 Kansas 947, 122 Pacific 1041, be considered as part of the evidence in this case, that being the decision in which the State of Kansas recognized and declared that the Arkansas River was navigable throughout its limits, within the State of Kansas.

The Court: May that be agreed, Mr. Powers?

In view of your statement that the facts as disclosed by the various exhibits introduced today at the pre-trial hearing will not be controverted by either side, I assume that those exhibits may be taken into consideration by the Court in connection with any motion for summary judgment that may be filed either by the plaintiff or by the defendants. Is that correct?

In the absence of a suggestion by one or the other of the parties that they propose to file a motion for summary judgment, I would expect to try to work out some agreement about a date for trial of the case. But since I do understand that you have been directed, Mr. Powers, by the Department of Justice to file a motion for summary judgment, I think that should be disposed of before the case is set for trial. And in that connection I suggest that in the first place that you file your motion as soon as possible, and, secondly, that when you do file your motion that you

present to the court a memorandum brief in support of it, and of course serve a copy of that brief upon the defendant and the intervener. And I should like then for the defendant and intervener—I will just refer to the intervener as defendant also because you are in the same position—file an answer brief within a reasonable time after that brief is served on you, and I suspect we had better agree on the amount of time that you will need to respond to that brief.

Mr. Scarritt: Well, I would like to say, in that connection, we would like to make the brief very thorough and complete because there is no reason why we should not discuss the entire law question at that time. And we would like sufficient time in order to do that.

[fol. 105] The Court: That is what I should like for you to do. Of course there is, conceivably, a possibility that decision on the motion for summary judgment would dispose of the lawsuit as far as this court is concerned; and, even if it does not, disposition of that motion will be followed within a short time thereafter by a trial, and it will be very helpful to the court in the trial of the case to have the matter thoroughly briefed and consider it before trial. So, I am expecting you in presenting these briefs to go into it thoroughly.

Mr. Powers: If Your Honor please, we have drawn a motion for summary judgment along certain lines, but there has arisen this morning one or two items which the motion for summary judgment is not directed toward. A little novel matter; It has a little twist on the whole situation. It is a little bit different from the attack we have taken upon it. It might be that it will be necessary for us to amplify again our motion for summary judgment, and direct our proof towards another phase of the lawsuit; so I would like to ask the Court to be a bit more indulgent with me in the filing of the motion, and the brief to accompany it. The brief we have now is about half written, and the motion is all prepared; but it has taken a little bit different tack this morning.

The Court: Of course it will take you some time perhaps to prepare your motion. And since I have requested you to file a brief at the time you file your motion, it will take even more time to prepare your brief, I am sure. So my only suggestion is that you do that as soon as possible.

Mr. Powers: Well——

Mr. Marlin: Let me remind Your Honor, too, that we are at a little disadvantage, the State, in Oklahoma City, and chief counsel who is really carrying the law in this case. We feel we ought to render some assistance to him in the matter, and give us an opportunity to get together. So, whatever time you give, I wish you would take into consideration the fact that we don't live in the same town.

The Court: What time will you suggest? I will give you whatever time you think necessary; and if the time allowed doesn't prove to be sufficient, I will give you a little more.

[fol. 106] Mr. Marlin: I think we should have about thirty days.

The Court: Then that will be the order, that you will have thirty days to file your response to the motion for summary judgment, and your brief.

Mr. Scarritt: And it will be the understanding that if we find we can't do it in that time, that we might have an extension.

The Court: And of course you are always at liberty to ask the court for an extension of time.

Mr. Scarritt: Then there is only one other matter and that is as to the photostats. We would like to have photostats of the Government's Exhibits if we might. We have a photostating machine in our office.

The Court: Suppose we have an understanding that the reporter may deliver to you the Government's Exhibits for the purpose of enabling you to have photostatic copies made.

Mr. Scarritt: We would be glad to do that.

The Court: And you return them to the Reporter as soon as you have them.

Mr. Powers: It is no more expense, Mr. Scarritt, to make two photostat copies rather than one; those are all the copies I have, too.

Mr. Scarritt: No, we would be glad to—well, there is a little more expense. We will be glad to make them for you, though.

The Court: There is more expense, but you will be willing to accommodate the Government by doing that. All right.

* * * * * * *

(The reporter has been furnished a typewritten copy of a portion of "Treaty with the Western Cherokee, May 6, 1828, 7 Stats. 311," designated by counsel for defendants

as Defendant's Exhibit 1 copied from Kappler-Indian Affairs Laws and Treaties, Vol. II, page 288.)

[fol. 107] Reporter's Certificate to foregoing transcript omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF TRIAL PROCEEDINGS—Filed April 23, 1945

Be It Remembered that on the 16th day of September, A. D., 1944, in the above-named Court, before the Honorable Royce H. Savage, United States District Judge, the above-styled and numbered cause came on regularly for trial.

Appearances: Whit Y. Mauzy, Esq., U. S. Attorney, and Wm. K. Powers, Esq., Asst. U. S. Attorney, Attorneys and Counselors at Law, For the United States of America. J. Walker Field, Esq., Assistant Attorney General, State of Oklahoma, For defendant, Champlin Refining Company, and intervener, State of Oklahoma.

All parties, thus represented, having announced "ready for trial", the following proceedings were had and done, to-wit:

[fol. 108] The Court: The United States versus Champlin Refining Company.

Mr. Powers: If Your Honor please, on an early date in August, this Court had for consideration a motion for summary judgment, of the plaintiff, denied the same, and set the case for hearing on this date. It has been set previously on other dates, and, in an effort to accommodate Mr. Scarritt, we finally arrived at this date. And now I am advised by Mr. Field, who represents the State of Oklahoma, that Mr. Scarritt is engaged in the trial of a lawsuit that commenced yesterday at noon, and it will be impossible for him to be here.

We have entered into a stipulation which is now being prepared by my stenographer, in reference to deleting a word. The essence of the stipulation is as follows—I believe I—as a matter of fact, I can give you the exact wording of that stipulation—do you have a copy of that stipulation

we prepared in reference to the navigability of the river, Mr. Field? At any rate, this stipulation is to the effect that it shall be considered that the United States of America has introduced evidence showing that the river at the place and points in question, and at the time in question, was non-navigable in fact, and that the defendant has introduced no evidence of said fact, but that the defendant has objected to the introduction of such evidence for the reason that—further reason that it is immaterial, due to the matter of law decided in the No Legs case; and, a second portion of the stipulation is that it shall be considered for the purposes of this lawsuit that the meander line as shown on the survey is the high-water mark on the south half of the river bed at the place in question for the purpose of determining the limit of the land in question in this proceeding.

That stipulation has been entered into by the parties, and, consequently, due to that, there will be no requirement for any introduction of evidence as to the navigability of the river.

Now then, I would like to re-offer in evidence in the trial the nineteen exhibits which were introduced by the plaintiff at the pre-trial hearing and to have the record show that [fol. 109] those nineteen exhibits introduced by the plaintiff at the time of the pre-trial hearing shall be considered introduced in evidence in this proceeding as of this date.

The Court: Yes.

Mr. Field: Likewise, all exhibits introduced by the defendants and interveners may also be considered by the Court here.

The Court: I assume there is no objection to that.

Mr. Powers: No objection.

The Court: Let all the exhibits—those exhibits admitted by the court which were offered by the plaintiff, as well as those offered by the defendant, will be considered in evidence in the trial of this case.

Mr. Powers: And I have one additional exhibit, if Your Honor please, which is Plaintiff's Exhibit No. 20, which is Article 2 of the Treaty with Cheyenne and Arapahoe Indians concluded October 28, 1867, 15 Stat. 593. This Article 2 simply outlines the tract of land which the Cheyenne and Arapahoe Indians were to occupy, lying west of the Osage allotment and it describes it as the east boundary, down the middle of the main channel of the Arkansas River. We wish to offer that in evidence.

The Court: The exhibit may be admitted.

Mr. Field: No objection.

Mr. Powers: Now, if Your Honor please, in addition to that, we have heretofore filed a motion for summary judgment, which has been denied by the court, and I don't know whether, as a matter of fact it will be considered by the Court upon appeal, but for the purposes of this appeal I would like to offer in evidence the exhibits attached to our Motion for Summary Judgment, as follows: Exhibit B is this map showing the restricted allotments which we had, and the tracts of land which are leased by the Champlin Refining Company.

The Court: Let me make this suggestion, Mr. Powers: That the exhibits attached to the Motion for Summary [fol. 110] Judgment, which you may now desire to offer, be marked in numerical order with the other exhibits.

Mr. Powers: Yes, sir.

The Court: Already offered in evidence.

Mr. Powers: I wondered—there was this about it: I wondered if we could mark the——

Mr. Field: Aren't those the same as introduced at the trial?

Mr. Powers: Yes, they were introduced.

Mark this exhibit, which is Exhibit B on Plaintiff's Motion for Summary Judgment, as Plaintiff's Exhibit No. 21.

The Court: Yes.

Mr. Powers: Plaintiff's Exhibit C, which is the copy of the opinion of the District Court in the Brewer Elliott case, as Plaintiff's Exhibit No. 22.

The Court: Is that a published opinion?

Mr. Powers: Yes, it is a published opinion. I do that for this reason: There is a succeeding order of the Court which is Plaintiff's Exhibit D to my motion, which was an order of the Court making the opinion the findings of fact in that case. "It is this day ordered that the findings as contained in the written opinion filed in the litigation and the final decree in the above-entitled cause, be and the same are adopted as findings of fact by the Court herein. Now, for the purpose of the record it might be wise that—it would not be necessary to take up all this in the record, that is, the opinion, because it is published—a printed opinion.

Mr. Field: Is that the opinion of the Supreme Court of the United States?

Mr. Powers: That is the opinion of the District Court.

The Court: Have your exhibits marked.

Mr. Field: I think the Court will take judicial knowledge of the other opinion that followed that——

[fol. 111] The Court: As well as that one.

Mr. Field: Yes, sir, I don't see the object of introducing it; but we have no objection.

Mr. Powers: I would also like to offer in evidence, if the Court please, the decree—the formal decree in the Brewer Elliott decision in the trial court, which is marked Plaintiff's Exhibit No. 24.

The Court: All right, it may be admitted.

Mr. Powers: Along that line, if Your Honor please, Mr. Field has presented to me a stipulation which I have executed, signed by Mr. Scarritt, and other counsel, which contains therein a photograph of the oil well which the Champlin Refining Company has in the river, and certain facts by Mr. Hawkins, Chairman of the Board of Administration of the State of Kansas in reference to the rental and royalties received from the oil wells producing in the bed of the Arkansas River in the State of Kansas. The stipulation is as follows: That the Champlin Refining Company has drilled a well at the location shown on the attached Exhibit A, which well is now producing oil in commercial quantities. It is further stipulated that a photograph of said well, and that portion of the Arkansas River in which it was drilled, was taken by Dick McConkay on June 17, 1944 from a location on the south bank of the Arkansas River—and that if he were present he would testify that the photograph correctly reveals that. It is further stipulated and agreed that certificates of Mr. Hawkins, Chairman of the Board of Administration, may be introduced in evidence as though the statements therein contained were testified by him in person. Now, the stipulation is entered into with the only objection that I make as to the materiality or competency of such evidence.

The Court: Your objection will be overruled, and I will receive the stipulation. The same order will be made with respect to the other stipulation entered into.

Mr. Powers: Now, if Your Honor please, that disposes of the evidence in the case, I believe.

The Court: Let me ask you: I believe there was a stipulation entered into to the effect that the decision in this case

[fol. 112] could not result that the United States could not bring a separate action to recover title.

Mr. Field: Yes, sir.

Mr. Powers: That is a part of the records of this case; I don't know whether it would have to be introduced in evidence or not. We can't—have you seen that stipulation?

The Court: That is a part of the record; I have seen it; it is a part of the record.

Mr. Powers: Yes, sir, it has been filed.

Mr. Field: Yes, sir, that is a stipulation we had a quarrel over one word in it. We finally ironed that out.

The Court: All right, do you have any evidence?

Mr. Field: I have just to formally present to Your Honor, in case you might want to give us an opportunity to be heard relative to the sufficiency of our findings of fact and conclusions of law and the formal objections to the findings of fact and conclusions of law as presented by them, as to being adopted—in other words, if there is any question in the mind of the court on the final decision as to any portion of the particular findings we requested——

The Court: I haven't—I haven't read your requested findings as yet. Nor the objections to them made by the Government. And I think probably the most satisfactory way to proceed would be for the court to endeavor to prepare the findings and conclusions based on the suggestions that have been submitted, and then I will fix a date for the filing of the findings and conclusions, and the entry of the decree formally in the case. I am going to enter judgment for the defendant in this case, but the judgment will be entered at the time the findings and conclusions are filed in the case, and the decree is signed and filed by the court.

Mr. Field: Well, our suggestions, then, in fact, are a part of the record, and have been filed in the Clerk's office, and likewise his, as I understand it. And, just to complete the file, as far as we are concerned, we would like to file our objections to certain portions of the findings of fact, as suggested by him——

[fol. 113] The Court: Yes, all right, you may do that.

Mr. Field: For your consideration. Then it will be understood that at a later date you will enter your findings of law, and formal judgment, at which time we might each party have an opportunity to take exception to such as we saw fit at that time.

The Court: What I will very likely do, is prepare findings and conclusions, and file them; furnish counsel with a copy and at that time fix a date upon which a decree will be entered, formally, in the matter.

Mr. Powers: And, for your assistance, if Your Honor please, we have not filed formal objections to the requested findings of fact as prepared by the defendant, and I would like to ask of the Court whether you would prefer we would do it prior to the time you make your findings, or after you may make your findings then file our objections?

The Court: Have you prepared requested findings?

Mr. Powers: Yes, we have filed those.

The Court: Well, that is sufficient.

Mr. Powers: We haven't made any specific objections.

The Court: I think an examination of your requested findings will show——

Mr. Powers: Yes, sir—the difference——

The Court: The difference between your idea and what the findings should be.

Mr. Powers: It will.

The Court: That will be sufficient.

Mr. Field: Of course your judgment, of course, will be also in favor of the intervener, as to the rights of the State of Oklahoma in the matter.

The Court: Yes, sir. I believe that's all I have on this docket this morning.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 114] [File endorsement omitted.]

PLAINTIFF'S EXHIBIT A

The United States of America

To all to whom these Presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated July 8, 1893, from the Commissioner of Indian ** acting* Affairs, approved by the Secretary of the Interior July

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* Matter in italics appears as handwritten correction on printed original.

10, 1893 whereby it appears that, under the provisions of the Act of Congress approved February 8, 1887, (24 *Stats February 28, 1891* (26 *Stats. 794) and March 3, 1893 (27 Stat. 644)*
388,) (as amended by the Act of † [Congress of of] William Bayhylle, an Indian of the Pawnee tribe or band, has been allotted the following-described land, viz:

The west half of the northeast quarter of section twenty and the southwest quarter of the southeast quarter and the lot numbered six of section seventeen in Township twenty-three north of Range four east of the Indian Meridian, [fol. 115] Oklahoma Territory containing one hundred and twenty-nine acres.

Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, Hereby Declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said William Bayhylle or, in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I Grover Cleveland, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

[L. S.]
1936992

By the President: Grover Cleveland, By M. McKean, Secretary. L. Q. C. Lamar, Recorder of the General Land Office. (Seal.)

---

† Matter in brackets struck out in copy.

[fol. 116] Department of the Interior, General Land Office

Washington, D. C., Oct. 7, 1942.

I hereby certify that this photograph is a true copy of the patent record which is in my custody in this office.

R. S. Clinton, Chief, Patents Division. (Seal.)

PLAINTIFF'S EXHIBIT 2

No. 28

The United States of America

To all to whom these Presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated July 8, 1893, from the Commissioner of Indian Affairs, **Acting*
approved by the Secretary of the Interior July 10, 1893 whereby it appears that, under the provisions of the Acts of Congress approved February 8, 1887, (24 Stats., 388,) (as amended by the Act of †[Congress of] February 28, 1891 (26 Stat. 794) and March 3, 1893 (27 Stat. 644) or †[Horace] Field, an Indian of the Pawnee tribe or band, has been allotted the following-described land, viz:

The South East quarter of the North West quarter, and the Lots numbered one, two and three of Section nineteen in Township twenty-three North of Range four East of the Indian Meridian, in Oklahoma Territory, containing one hundred and twenty-one acres and sixty-six hundredths of an acre

Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, Hereby Declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth action) for the

---

* Matter in italics appears as handwritten correction on printed original.

† Matter struck out in copy.

period of twenty-five years, in trust for the sole use and benefit of the said Horace Field or —— —— or, in case of [fol. 117] his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

1936992
[L. S.]

By the President: Grover Cleveland, By M. McKean, Secretary. L. Q. C. Lamar, Recorder of the General Land Office. (Seal.)

Department of the Interior, General Land Office

Washington, D. C., Oct. 7, 1942.

I hereby certify that this photograph is a true copy of the patent record which is in my custody in this office.

R. S. Clinton, Chief, Patents Division.

[fol. 118] PLAINTIFF'S EXHIBIT 3

454

The United States of America

To all to whom these Presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior June 1, 1906, whereby it appears that Ethel Lewis Barnes an Indian of the Otoe and Missouria tribe or band has been allotted the following-

described land, the South half and the North East quarter of the South East quarter and the Lot numbered five of Section twenty-four, in Township twenty-three North of Range three East, of Indian Meridian in Oklahoma, containing one hundred and fifty-two acres and twenty hundredths of an acre

Now know ye, that the United States of America, in consideration of the premises, as allotted, and by these presents does allot, unto the said Ethel Lewis Barnes the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law:

Provided, that the President of the United States may, in his discretion, extend said period.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixt.

Given under my hand at the City of Washington, this twenty-fourth day of November, in the year of our Lord [fol. 119] one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

1936992

By the President: T. R. Roosevelt, by F. M. McKean, Secretary. C. H. Brush, Recorder of the General Land Office. (Seal.)

Department of the Interior, General Land Office

Washington, D. C., Oct. 7, 1942.

I hereby certify that this photograph is a true copy of the patent record which is in my custody in this office.

R. S. Clinton, Chief, Patents Division. (Seal.)

PLAINTIFF'S EXHIBIT 4

(Record of Patents)
4-182b-tyr.

The United States of America,

To all to whom these presents shall come, Greeting:
409 A.

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior January 17, 1907, whereby it appears that Anna Robedeaux, an Indian of the Otoe and Missouria tribe or band, has been allotted the following-described land: the West half of the South East quarter and the South East quarter of the South East quarter of Section one, and the South West quarter of the North East quarter of Section thirteen in Township twenty two North of Range one East and the Lot numbered six of Section twenty four in Township twenty three North of Range three East of Indian Meridian in Oklahoma, containing two hundred and five acres and forty five hundredths of an acre.

Now Know Ye, That the United States of America, in [fol. 120] consideration of the premises, has allotted, and by these presents does allot, unto the said Anna Robedeaux the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law: Provided, That the President of the United States may, in his discretion, extend said period.

In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the tenth day of June, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty first
1936992

By the President: Theodore Roosevelt, by F. M. McKean, Secretary. H. W. Sanford, Recorder of the General Land Office. (Seal.)

Department of the Interior, General Land Office

Washington, D. C., Oct. 7, 1942.

I hereby certify that this photograph is a true copy of the patent record which is in my custody in this office.

R. S. Clinton, Chief, Patents Division.

[fol. 121] PLAINTIFF'S EXHIBIT 5

W.J.V. W.H.C.

Department of the Interior

Washington, June 25th, 1881.

The Commissioner of Indian Affairs.

Agreeably to your recommendation of the 13th instant. The following described lands in the Indian Territory west of the 96° west longitude in the tract ceded to the U. S. by the Cherokees for the settlement of friendly Indians, by the 16th Article of their Treaty of July 19, 1866, are hereby designated and assigned for the use and occupation of the Confederated Otoe and Missouria Tribes of Indians under the provisions of the Act of Congress approved March 3, 1881, namely

Tp. 22 N. R. 1 E.	containing	23,013.70	acres
" 23 " " 1	"	23,018.79	"
" 22 " " 2	"	23,049.27	"
" 23 " " 2	"	22,945.91	"
" 22 " " 3	"	22,986.69	"
also that portion of Tp. 23, N. R. 3 E. lying west of the Arkansas River containing		14,098.84	"
Total acreage		129,113.20	"

The papers which accompanied your letter before noted, are herewith returned.

1188, I. O. 1881
1155-1182-1183
1408 and 1485 M. 1881

Ten Enclosures.

Very respectfully, L. I. Kirkwood, Secretary.

7485)
7768)
Int. Dept. 9271) 81
9916)
10407)

June 25—N

[fol. 122] Case No. 95

Designating and assigning with in described lands to Confederated Otoes & Missourias Inds & Rcts paprs (illegible) to same.

See 19754
10 incl
L. B. 83 p. 73

Copy sent to Agents, Noodin and Shorb. June 29-1881.
L. B. 83 p 71.
L 10/238

[Certified]

PLAINTIFF'S EXHIBIT 6

This Indenture, made and entered into this fourteenth day of June A. D. Eighteen-hundred and Eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, in trust for the use and benefit of the Pawnee tribe of Indians of the Second part, Witnesseth; that, Whereas by the Sixteenth Article of the treaty concluded July nineteenth, A. D. Eighteen-hundred and Sixty-six, between said Cherokee Nation and the United States, the said United States acquired the right "to settle friendly Indians on any part of the Cherokee Country west of the

ninety sixth degree" of west longitude, under certain limitations therein mentioned;
and, Whereas by an Act of Congress approved March third, Eighteen-hundred and Eighty-three, three-hundred-thousand dollars ($300,000) was appropriated "to be paid into the treasury of the Cherokee Nation out of funds due under appraisement for Cherokee lands west of the Arkansas River", provided "That the Cherokee Nation through its proper authorities shall execute conveyances satisfactory to the Secretary of the Interior to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages now occupying [fol. 123] said tract as they respectively occupy the same, before the payment of said sum of money", now, Therefore by authority of an Act of the National Council of the Cherokee Nation aforesaid approved May eighth, Eighteen-hundred and Eighty-three, which recites "That Dennis W. Bushyhead Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of the Cherokee Nation, are hereby authorized and empowered, in the name of the Cherokee Nation, to execute deeds of conveyance as required by said Act, (March third, Eighteen-hundred and Eighty-three) for the tracts of Cherokee land for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages, as they respectively occupy the same", said party of the first part, by the aforesaid principal chief and delegates, and in consideration of the payment of the sum of money mentioned in the Act of March third, Eighteen-hundred and Eighty-three, aforesaid, as due under appraisement for Cherokee lands west of the Arkansas River, does by these presents grant, bargain, sell, remise, release, relinquish and confirm unto the said party of the second part, forever, in trust nevertheless and for the use and benefit of the Pawnee tribe of Indians, all those certain tracts of land lying and being in the Indian Territory; embracing the following township and fractional townships north and east of the Indian Meridian, the fractional townships being on the right bank of the Arkansas River:

Township twenty-one (21) and twenty-two (22), and fractional townships twenty-three (23) and twenty-four (24) north, range four (4) east;

Townships twenty-one (21) and twenty-two (22) and fractional townships twenty-three (23) and twenty-four (24) north, range five (5) east;

Township twenty-one (21) and fractional townships twenty-two (22) and twenty-three (23) north, range six (6) east;

Township twenty (20) north, range five (5) east, except lots seven (7), eight (8) nine (9) and ten (10), Section thirty-one (31); lots five (5), six (6), seven (7) and eight (8). Section thirty-two (32); lots five (5), six (6), seven (7), and eight (8), Section thirty-three (33); lots five (5), six (6), seven (7), and eight (8); Section thirty-four (34); lots five (5), six (6), seven (7) and eight (8); Section thirty-[fol. 124] five (35) and lots five (5), six (6), seven (7) and eight (8); Section thirty-six (36) Township twenty (20) north, range six (6) east, except lots seven (7), eight (8), nine (9) and ten (10); Section thirty-one (31); lots five (5), six (6), seven (7) and eight (8); Section thirty-two (32) lots five (5), six (6), seven (7) and eight (8); Section thirty-three (33); lots five (5), six (6), seven (7) and eight (8); Section thirty-four (34); lots five (5), six (6), seven (7), and eight (8); Section thirty-five (35); and lot one (1), section thirty-six (36); except also so much of section thirty-six (36) as lies within the present Creek reservation; According to a plat of said lands hereto annexed, marked "A", and made a part of this conveyance; containing in all two-hundred and thirty-thousand and fourteen and four-hundredths acres (230,014,04) hereby granted: together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining;

To have And to Hold the said premises as above described, with the appurtenances, unto the said party of the second part, for the use and purposes aforesaid.

In Witness Whereof the party of the first part hath subscribed this conveyance by the said principal chief and delegate aforesaid, who have also hereunto set their hands and seals this fourteenth day of June, A. D., Eighteen-hundred and Eighty-three.

The Cherokee Nation, by Dennis W. Bushyhead, LS, Principal Chief and Richard M. Wolfe, LS, Robert B. Ross, LS, Delegates of the Said Cherokee Nation. (Seal.)

Signed, sealed and delivered in the presence of Jos. K. McCammon, N. P. Loveridge, W. A. Phillips.

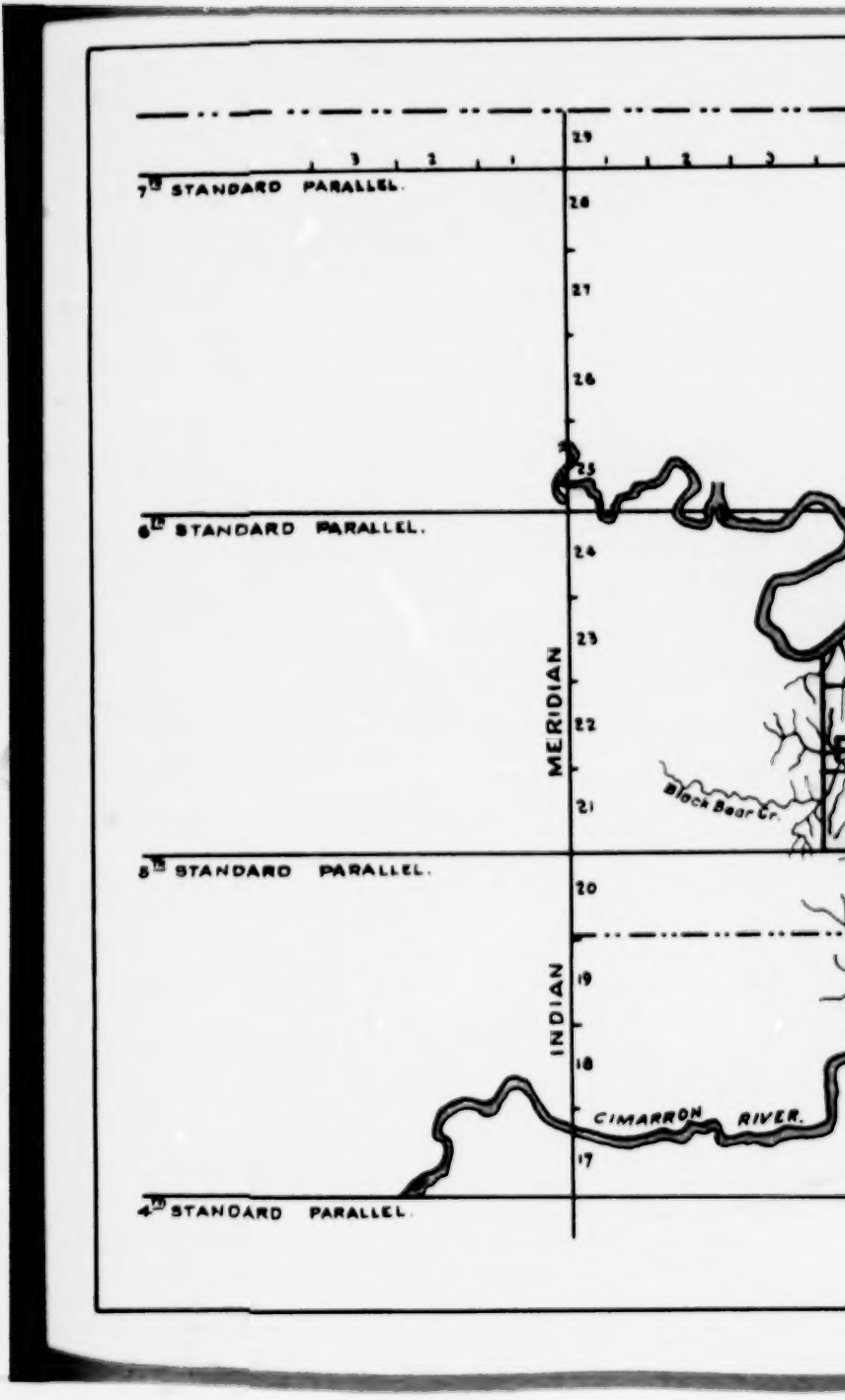
[fols. 125-126] DISTRICT OF COLUMBIA,
County of Washington, ss:

On this fourteenth day of June, A. D., Eighteen-hundred and Eighty-three before me a Notary Public in and for the District aforesaid personally came Dennis W. Bushyhead, Richard M. Wolfe and Robert B. Ross, to me known to be the persons who executed the foregoing instrument and acknowledged the same to be their free act and deed for the purposes and under the authority therein mentioned.

George M. Lockwood, Notary Public. (Seal.)

[Certified.]

(Here follows 1 Photolithograph, side folios 127-128)


7TH STANDARD PARALLEL.
6TH STANDARD PARALLEL.
5TH STANDARD PARALLEL.
4TH STANDARD PARALLEL.
INDIAN MERIDIAN
29
28
27
26
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22
21
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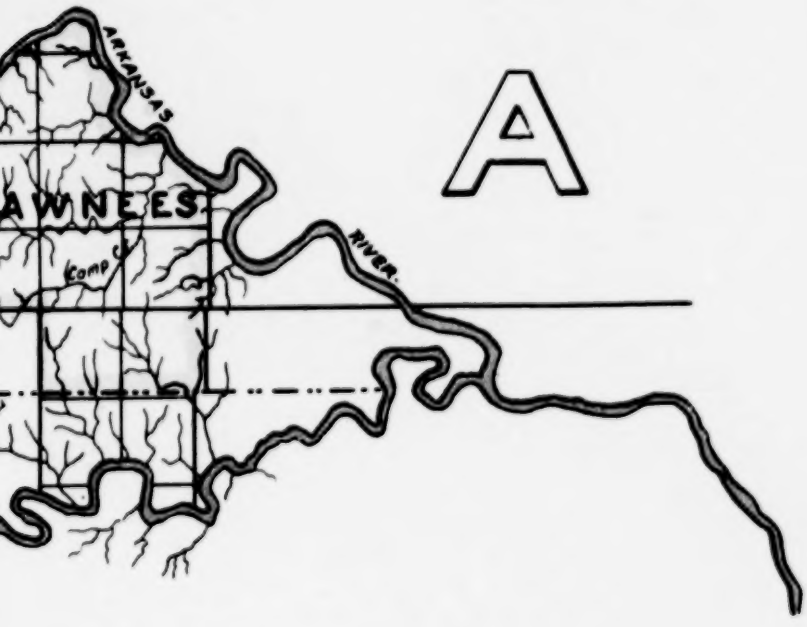
19
18
17
3
2
1
Black Bear Cr.
CIMARRON RIVER.


ARKANSAS
A
RIVER

[fol. 129] PLAINTIFF'S EXHIBIT 7

This Indenture, made and entered into this fourteenth day of June, A. D., Eighteen-hundred and Eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe, and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part and the United States of America, in trust for the use and benefit of the Otoe and Missouria Indians of the second part, Witnesseth: that,

Whereas by the sixteenth article of the treaty concluded July nineteenth, A. D., Eighteen-hundred and sixty-six, between said Cherokee Nation and the United States, the said United States acquired the right "to settle friendly Indians on any part of the Cherokee Country west of the ninety sixth degree" of west longitude, under certain limitations therein mentioned; and,

Whereas by an Act of Congress approved March third, eighteen-hundred and eighty-three, three hundred-thousand dollars ($300,000) was appropriated "to be paid into the treasury of the Cherokee Nation out of funds due under appraisement for Cherokee lands west of the Arkansas river", provided that "the Cherokee Nation through its proper authorities shall execute conveyances satisfactory to the Secretary of the Interior to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages now occupying said tract as they now respectively occupy the same, before the payment of said sum of money": now,

Therefore by authority of an Act of the National Council of the Cherokee Nation aforesaid, approved May eighth, Eighteen-hundred and Eighty-three, which recites "That Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of the Cherokee Nation, are hereby authorized and empowered, in the name of the Cherokee Nation, to execute deeds of conveyances as required by said Act March third, Eighteen-hundred and eighty-three, for the tracts of Cherokee land for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages, as they respectively occupy the same", said party of the first part, by the aforesaid principal chief and delegates, [fol. 130] and in consideration of the payment of the sum of money mentioned in the Act of March third, Eighteen-hundred and eighty-three aforesaid as due under appraisement

for Cherokee lands west of the Arkansas River, does by these presents grant, bargain, sell, remise, release relinquish and confirm unto the said party of the second part, forever, in trust nevertheless, and for the use and benefit of the Otoe and Missouria Indians, all those certain tracts of land lying and being in the Indian Territory, embracing the following townships and fractional township North, and East of the Indian Meridian, viz:

Township twenty-two (22) and twenty-three (23) North, range one (1) East; Townships twenty-two (22) and twenty-three (23) North, range two (2) East; Township twenty-two (22) North, range three (3) East; Fractional township twenty-three (23) North, range three (3) East of the Indian Meridian; lying and being on the right bank of the Arkansas River, according to a plat of said lands hereto annexed, marked "A", and made a part of this conveyance, containing in all one-hundred and twenty-nine-thousand, one hundred and thirteen and twenty-hundredths (129, 113, 20) acres, hereby granted; together with all and singular the hereditaments and appurtenances thereto belonging, or in any wise appertaining;

To Have and To Hold the said premises as above described, with the appurtenances, unto the said party of the second part, for the use and purposes aforesaid.

In Witness Whereof the party of the first part hath subscribed this conveyance by the said principal chief and delegates aforesaid, who have also hereunto set their hands and seals this fourteenth day of June A. D., Eighteen-hundred and Eighty-three.

The Cherokee Nation, by Dennis W. Bushyhead, LS, Principal Chief, and Richard M. Wolfe, LS, Robert B. Ross, LS, Delegates of the said Cherokee Nation. (Seal.)

[fol. 131-132] Signed, sealed and delivered in the presence of Jos. K. McCammon, N. P. Loveridge, W. A. Phillips.

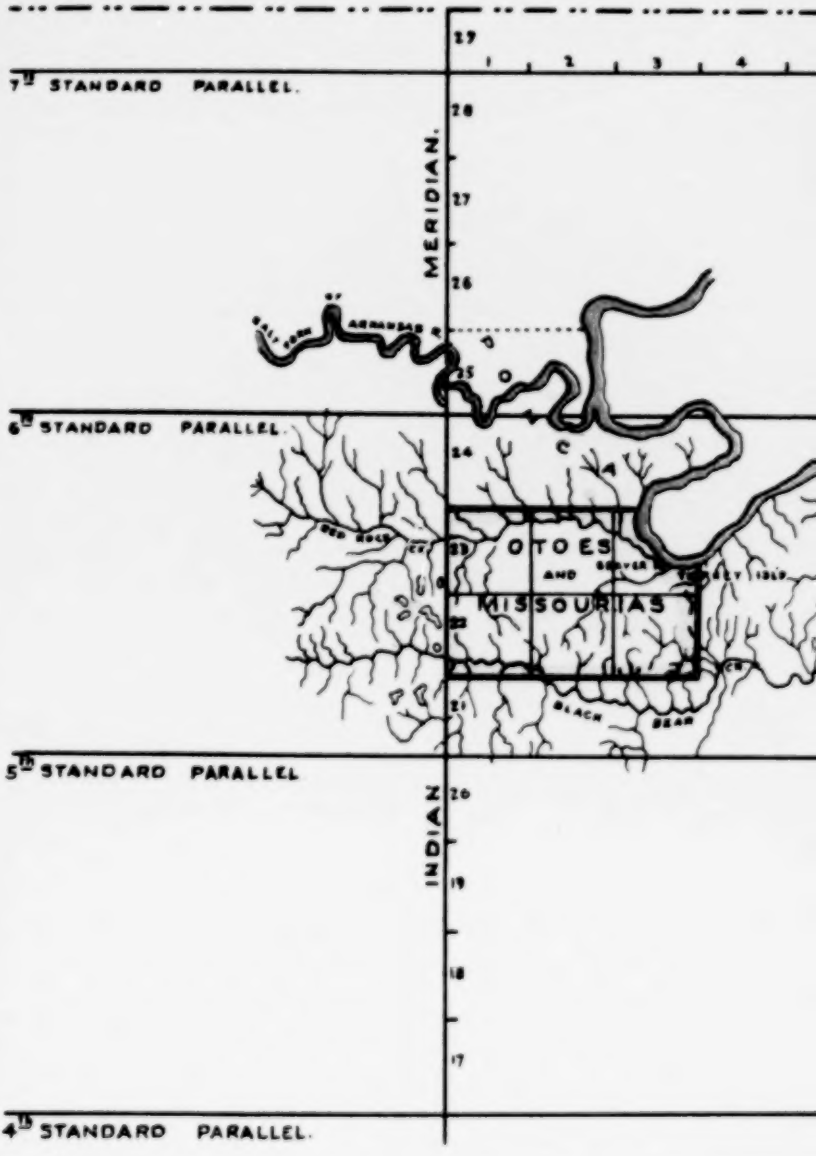
DISTRICT OF COLUMBIA,
County of Washington, ss:

On this fourteenth day of June A. D., Eighteen-hundred and Eighty-three before me, a Notary Public, in and for the District aforesaid, personally came Dennis W. Bushyhead, Richard M. Wolfe and Robert B. Ross, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed, for the purposes and under the authority therein mentioned.

Geo. M. Lockwood, Notary Public. (Seal.)

[Certified.]

(Here follows 1 Photolithograph, side folio 133-134)


7 12 STANDARD PARALLEL.
6 48 STANDARD PARALLEL.
5 36 STANDARD PARALLEL
4 15 STANDARD PARALLEL.
INDIAN MERIDIAN.
OTOES
AND
MISSOURIAS
BLACK BEAR
CR
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A

[fol. 135] PLAINTIFF'S EXHIBIT 20

[Plaintiff's exhibit 20 is a Treaty between United States of America and Cheyenne and Arapahoe Indians, October 28, 1867, and the Court by order of May 26, 1945, authorized reference to this exhibit without it being printed.]

[Plaintiff's exhibit 21 is identical with exhibit B to motion for summary judgment (page 35 this record) with the exception that a notation with reference to Champlin No. 1 river bed well is not shown on plaintiff's exhibit 21.]

PLAINTIFF'S EXHIBIT 22

[Plaintiff's exhibit 22, opinion, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al., is reported at 249 Fed. 609, and the court by order of May 26, 1945, authorized reference to this exhibit without it being printed.]

PLAINTIFF'S EXHIBIT 23

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 75 Equity

UNITED STATES OF AMERICA, Plaintiff,

vs.

BREWER-ELLIOTT OIL & GAS COMPANY, a Corporation, et al., Defendants

Order, That Findings of Fact in the Opinion Be Adopted as the Findings of Fact by the Court

It is this day ordered that the findings as contained in the written opinion filed on the rendition of the final decree

in the above entitled cause be and the same are adopted as the findings of fact by the court therein.

February 21, 1918.

John H. Cotteral, District Judge.

Endorsed: Filed in the District Court on February 21, 1918.

[fol. 136] PLAINTIFF'S EXHIBIT 24

IN THE DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 75 in Equity

UNITED STATES OF AMERICA, Plaintiff,

vs.

BREWER-ELLIOTT OIL & GAS COMPANY, et al., Defendants

Decree

On this twenty first day of February, 1918, the said cause comes on for final determination, after having been fully tried and submitted, and upon consideration thereof, and the arguments of counsel, it is by the court,

Ordered, adjudged and decreed, that the Osage tribe of Indians in Oklahoma acquired, as a part of its reservation, the title to the bed of the Arkansas River, lying adjacent to the lands of said reservation, in the State of Oklahoma, as far as and extending to the middle of the main channel of said river, together with the underlying oil, gas and other minerals, by virtue of the Act of Congress approved June 5, 1872, and as confirmed by the deed of the Cherokee Nation of Indians, dated June 14, 1883, that the title to said portion of said river bed and said minerals are subject to lease only for the benefit of said tribe, as provided by the laws of the United States, and as may be hereafter provided by said law, and that the said title of the said tribe and the United States as its trustee, should be and is hereby quieted. And it is further by the court,

Ordered, adjudged and decreed, that the defendant lessees and their sub-lessees, assignees and successors in interest and the interveners herein, and each of them, have no right,

title or interest to or in said portion of said river bed or minerals and that the leases therefor of the defendant companies and their sub-lessees, assignees and successors from the state of Oklahoma and its officers and agents involved in this cause be and they are hereby cancelled and held for naught. And it is further by the court,

Ordered, adjudged and decreed, that the net funds which have been and may hereafter be realized by the receiver herein from the oil and gas in said premises belong to, and be paid by him to, the United States in trust for said tribe, and that the said lessees and their sub-lessees, assignees and successors and said intervenors be denied any part [fol. 137] thereof, and in addition be and they are hereby enjoined from prospecting for or taking oil, gas or other minerals from said portion of said river bed, except in accordance with the orders for operation and payment under and in connection with the receivership in this cause, and for the preservation of said funds. And it is further by the court,

Ordered, adjudged and decreed, that this cause be retained for the purpose of settling and paying the costs and charges of the said receivership and apportioning to the plaintiff for the tribe its interest in the funds of the said receiver, and for the ascertainment of the rightful claimants and owners of the residue thereof, and the apportionment and payment to them of the same, and further for the purpose of taxing all costs herein, and the making of all proper future orders, and that in the meantime, and during the pendency of any and all appeals in this cause, the receiver be continued in his duties as heretofore directed, subject to future orders.

To the said decree, and every part thereof, and to each and every of the above findings and orders of the parties defendant and interveners and each of them separately and jointly, at the time excepted and except; and said exceptions are allowed:

Approved:

John H. Cotteral, District Judge.

Endorsed: No. 75. United States of America, vs. Brewer-Elliott Oil & Gas Co., et al. Final Decree. Filed Feby. 21, 1918. Arnold C. Dolde, Clerk. By M. V. Haws, Deputy.

[Certified.]

DEFENDANTS' EXHIBITS 1, 1 A, AND 1 B

[Defendants' exhibit 1 is a Treaty between United States of America and Western Cherokee Nation, May 6, 1828. Defendants' exhibit 1 A is a Treaty between United States of America and Western Cherokee Nation, 1833. Defendants' exhibit 1 B is a Treaty between United States of [fol. 138] America and Cherokee Nation, 1835. The court by order of May 26, 1945, authorized reference to these exhibits without them being printed.]

DEFENDANTS' EXHIBIT 1 C

(Illegible) day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States the sixty third.

By the President: Martin Van Buren. By M. Van Buren, Jr.

H. W. Garland, Recorder of the General Land Office.

The United States of America, To all to whom these Presents shall come, Greetings.

Whereas by certain treaties made by the United States of America with the Cherokee nation of Indians of the sixth of May, one thousand eight hundred and twenty eight, the fourteenth of February, one thousand and eight hundred and thirty three, and the twenty ninth of December, one thousand eight hundred and thirty five, it was stipulated and agreed on the part of the United States, that in consideration of the premises mentioned in the said treaties, respectively, the United States should guarantee, secure and convey, by patent, to the said Cherokee nation, certain tracts of land; the description of which tracts and the terms and conditions on which they were conveyed, are set forth in the second and third articles, of the treaty of the twenty ninth of December, one thousand eight hundred and thirty five in the words following, that is to say: "Article 2." Whereas, by the "treaty of May sixth, one thousand eight hundred and "twenty eight, and the supplementary treaty thereto "of February fourteenth, one thousand eight hun- "dred and thirty three, with the Cherokees West of "the Mififippi, the United States *guarantied* "and accrued, to be conveyed by patent to the "Cherokee nation of

Indians, the following tract of country: "Beginning at a point on the old western territorial line of "Arkansas territory, being twenty five miles north from the "point where the territorial line crofes Arkansas river; thence "running from said north point south on the said territorial "line, [fol. 139] where the said territorial line crofes Verdigris river; thence "down said Verdigris river to the Arkansas; thence down "said Arkansas to a point where a stone is placed opposite "the east or lower bank of Grand river, at its junction with "the Arkansas; thence, running south forty four degrees "west one mile; thence in a straight line, to a point four "miles northerly from the mouth of the north fork of the "Canadian; thence, along the said four mile line to the "Canadian; thence down the Canadian to the Arkansas, "thence down the Arkansas to that point on the Arkansas "where the Eastern Choctaw boundary strikes said river and "running thence with the western line of Arkansas territory "as now defined, to the south west corner of Mifouri; "thence along the western Mifouri line to the land "afigned the Seneca; thence, on the South line of the "Senecas to Grand river; thence, up said Grand river, "as far as the South line of the Osage reservation extends "if necefary; thence up and between said South Osage "line extended West of necefary, and a line drawn "due west from the point of beginning to a certain distance "west, at which a line running North and South from "said Osage line to said due West line, will make seven "millions of acres within the whole described boundaries. "In addition to the seven millions of acres of land "this provided for and bounded, the United States "further guaranty to the Cherokee Nation a perpetual "outlet West, and a free and unmolested use of all "Country West of the Western (illegible) "millions of acres, as far West as the sovereignty of the United "States and their right of soil extended, Provided however, "That if the Saline or Salt plain on the Western prairie "shall fall within said limits prescribed for said outlet, "the right is reserved to the United States to permit other "tribes of red men to get Salt on said plain, in common "with the Cherokees. And letters patent shall be "ifued by the United States as soon as practicable "for the land hereby *guarantied*. And whereas, it is apprehended by the Cherokees that in the above cefion "there is not contained a sufficient quantity of lands "for the accommodation of the whole nation, on their "removal West

of the Mififippi, the United States, in "consideration of the sum of five hundred thousand "dollars, therefore hereby covenant and agree to convey "to the said Indians and their [fol. 140] descendants, by patent, "in fee simple, the following additional tract of land "situated between the west line of the State of Mifouri "and the Osage reservation, beginning at the Southeast "corner of the same, and runs North along the East line of "the Osage land fifty miles, to the Northeast corner thereof; and thence East to the West line of the State of Mifouri; thence with said line South fifty miles; thence West "to the place of beginning; estimated to contain eight "hundred thousand acres of land but is exprefly understood "that if any of the land assigned the Quapaws shall "fall within the aforesaid bounds, the same shall be reserved "and excepted out of the lands above granted, and a "prorata reduction shall be made in the price to be "allowed to the United States for the same by the Cherokees. "Article 3:" The United States also agree, that the "land above ceded by the Treaty of February fourteenth, "one thousand eight hundred and thirty three including "The outlet, and those ceded by the treaty, shall all be "included in one patent executed to the Cherokee Nation of "Indians by the President of the United States according "to the provisions of the Act of May twenty eight, one thousand "eight hundred and thirty. It is however, agreed that the "military reservation at Fort Gibson shall be held by "the United States. But should the United States "abandon said port, and have no further use for the same, "it shall revert to the Cherokee Nation. The United States "shall always have the right to make and establish such "post and military roads and forts in any part of the "Cherokee Country, as they may deem proper for the interest "and protection of the same, and the free use of as much land, "timber, fuel and material of all kinds, for the construction "and support of the same, as may be necefary; provided, that "if private rights of individuals are interfered with just "compensation therefor shall be made."

And whereas, the United States have caused the said tract of seven millions of acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows:

Beginning at a mound of rocks four feet square at base and four and a half feet high, from which another mound

of Rocks bears South one chain, and another mound of rocks [fol. 141] bears West on- chain, on what has been denominated the old western territorial line of Arkansas Territory, twenty five miles north of Arkansas river; thence South twenty one miles and twenty eight chains, to a post on the northeast bank of the Verdigris river, from which a hackberry fifteen inches diameter, bears South sixty one degrees thirty one minutes East, forty three links, marked C.H.I., and a Cottonwood forty two inches diameter, bears South twenty one degrees fifteen minutes, east fifty links marked C.R.K.L.; thence down the Verdigris river, or the Northeast bank, with its meanders, to the junction of Verdigris and Arkansas rivers, thence from the lower bank of Verdigris river, on the North bank of Arkansas river, South forty four degrees, thirteen minutes, East fifty seven chains, to a post on the South bank of Arkansas, opposite the eastern bank of Neosho river, at its junction with Arkansas, from which a red oak, thirty six inches diameter, bears South seventy five degrees, forty five minutes West, twenty four links and a hickory, twenty four inches diameter, bears South eighty nine degrees East four links; thence South fifty-three degrees West, one mile to a post, from which a rock bears North fifty three degrees East, fifty links and a rock bears South eighteen degrees, eighteen minutes west fifty links; thence South eighteen degrees, eighteen minutes West thirty three miles twenty eight chains and eighty links, to a rock, from which, another rock bears North, eighteen degrees, eighteen minutes east fifty links and another rock bears South fifty links; thence South four miles, to a post on the lower bank of the north fork of Canadian river, at its junction with Cananian river from which a Cottonwood, twenty four inches diameter, bears North eighteen degrees East, forty links, and a Cottonwood fifteen inches diameter, bears South nine degrees East fourteen links; thence down the Canadian river, on its North Bank, to its junction with Arkansas river; thence down the main channel of Arkansas river to the Western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on South Bank of Arkansas river four chains and fifty four links, East of Fort Smith; thence North seven degrees, twenty five minutes west, with the western boundary of the [fol. 142] State of Arkansas, seventy six miles, sixty four chains and fifty links to the Southwest corner of the State

of Mifouri; thence North, on the Western boundary of the State of Mifouri, eight miles, forty nine chains and fifty links, to the North bank of Cowskin or Seneca river at a mound six feet square at base, and five feet high, in which a post marked on the South side Co. N. Ch. L. A.; thence west on the southern boundary of the lands of the Seneca, eleven miles and forty eight chains to a post on the east bank of Neosho river, from which a maple, eighteen inches in diameter, bears South thirty one degrees East, seventy links; thence up Neosho river with it meanders, on the east bank to the southern boundary of Osage lands, thirty six chains and fifty links west of the Southeast corner of the lands of the Osages, witnefed by a mound of rocks on the west bank of Neosho river; thence west on the southern boundary of the Osage lands; to the line dividing the territory of the United States from that of Mexico, two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square at base, and five and a half feet high, in which is deposited a cylinder of charcoal, twelve inches long and four inches diameter; thence South along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square at the base and five and a half feet high, in which is deposited cylinder of charcoal, eighteen inches long and three inches diameter; thence east along the northern boundary of Creek lands, two hundred and seventy three miles, fifty five chains and sixty six links to the beginning, containing within the survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundreths of an acre. And whereaf, the United States have also caused the said tract of eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof to be as follows: Beginning at a South east corner of Osage lands, described by a rock from which a red oak, twenty inches in diameter, bears South twenty seven degrees East seventy six links, and a burr Oak, thirty inches in diameter, bears South fifty-nine degrees West one chain; and another burr oak thirty inches diam-ter, bears North eight degrees west, one chain and thirty seven links; and another burr oak forty inches in [fol. 143] diameter, bears North thirty degrees West, one chain, and eighty one links, and running east twenty five miles to a rock on the western line of the State of Mifouri, from which a post oak, ten inches diameter, bears North

forty eight degrees, thirty minutes east, four chains; and a post oak twelve inches diameter, bears South sixty two degrees East five chains; thence North with the western boundary of the State of Mifouri, fifty miles, to a mound of earth five feet square at base and four and a half feet high; thence West twenty five miles to the North east corner of the lands of the Osages, described by a mound of earth six feet square at the base and five feet high; thence South along the Eastern boundary of Osage lands, fifty miles, to the beginning: containing eight hundred thousand acres.

Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted and by these presents do give and grant, unto the said Cherokee Nation, the two tracts of land as surveyed and herein before described, containing, in the whole Fourteen millions, three hundred and seventy four thousand one hundred and thirty five acres, and fourteen hundredths of an acre: To have and to hold the same, together with all the rights, privileges and appurtenances thereunto belonging to the said Cherokee Nation forever, subject however to the right of the United States to permit other tribes of red men to get Salt on the Salt plains on the western prairie, referred to in the Second Article of the treaty of the twenty ninth of December, one thousand eight hundred and thirty five, which Salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said Article; and subject also to all the other rights reserved to the United States, in and by the article herein before recited, to the extent and in the manner, in which the said rights are reserved; and subject also to the condition provided by the Act of Congref of the twenty eighth of May one thousand eight hundred and thirty; referred to in the above recited third Article, and which condition is that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct or abandons the same.—

In Testimony Whereof, I, Martin Van Buren, President [fol. 144] of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.—

Given under my hand, at the City of Washington, the thirty first day of December, in the year of our Lord, one

thousand eight hundred and thirty eight and the Independence of the United States, the sixty third.

By the President: M. Van Buren. H. W. Garland, Recorder of the General Land Office. (Seal.)

[Certified.]

Defendants' Exhibits 2, 3, 4 and 5

[Defendants' exhibit 2 is a Treaty between United States of America and Cherokee Nation, July 19, 1866. Defendants' exhibit 3 is Act of April 10, 1876; 19 Stat. 28; Sec. 4, Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 160. Defendants' exhibit 4 is Act of March 3, 1881; 21 Stat. 380; Sec. 5, Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 190. Defendants' exhibit 5 is 22 Statutes at Large, page 624, 47 Congress Session 11 Ch. 143, 1883. The Court by order of May 26, 1945, authorized reference to these exhibits without them being printed.]

Defendants' Exhibit 5 A

Executive Orders Relating to Indian Reserves. 271
Modoc Reserve

Articles of agreement made and concluded at Quapaw Agency, I. T., June 23, 1874, between the United States, by H. W. Jones, United States Indian Agent, and the Eastern Shawnee Indians.

Whereas it is desirable that the Modoc Indians (now temporarily located on the Eastern Shawnee Reservation) should have a permanent home in order that they may be enabled to settle down and become self-supporting. Therefore, it is agreed—

1st. The Eastern Shawnees cede to the United States a tract of land situated in the northeast corner of their pres- [fol. 145] ent reservation in the Indian country. The land so ceded to be *m*ounded as follows, to wit: Beginning at the northeast corner of their reservation, running south along the Missouri State line two and one-half miles; thence west two and one-half miles; thence north to the north line of said reserve; thence east along said north line

to the place of beginning, containing 4,000 acres, more or less, for which the United States is to pay six thousand dollars, one-half upon the ratification of this agreement by the Secretary of the Interior, the balance in twelve months thereafter; said instalments to be paid to the Eastern Shawnee Indians per capita, for the purpose of enabling them to enlarge their farms and otherwise improve their condition in civilization.

2d. The land proposed to be purchased in the 1st article of this agreement shall be set apart as a permanent home for the Modoc Indians.

3d. And it is further agreed that in case the United States fails to carry out the provisions of the agreement this contract shall be null and void.

In testimony whereof we have hereunto set our hands and seals the day and year first above written.

H. W. Jones, [Seal]
U. S. Indian Agent.
James Choctaw, his + mark.
Thomas Captain, his + mark.
Chiefs.
John Logan, his + mark.
John Williams, his + mark.
Councillors.
Good Hunt, his + mark.
Billy Dick, his + mark.
John Mohawk, his + mark.
Corn Stalk, his + mark.
George Beaver, his + mark.
Samson Kyzer, his + mark.
John Jackson, his + mark.
Young Men.

Attest:

Lazarus Flint, Interpreter.
Endsley Jones.

(Recorded in Records of Treaties, vol. 3, p. 19.)

[fol. 146] This agreement was confirmed in Indian appropriation act of March 3, 1875. (18 Stats, p. 447.)

[At this point in defendants' exhibit 5 A is set out a letter, June 25, 1881, The Secretary of the Interior to the Commissioner of Indian Affairs, which appears at page 121 of this record as plaintiff's exhibit 5.]

272 Executive Orders Relating to Indian Reserves
Ponca Reserve

By the Indian appropriation act of August 15, 1876 (19 Stats., p. 192), an appropriation was made for the removal of the Poncas to the Indian Territory when they should consent to go. By the Indian appropriation act of March 3, 1877 (19 Stats., p. 287), an additional appropriation was made for the same purpose, but there was nothing contained therein respecting their consent. Under these acts the Poncas were removed to the Quapaw Reserve. Inspector Watkins and Agent Boone, under department instructions took a delegation of these Indians, in December, 1877, to the country west of the Arkansas River to select a permanent home, either in the triangle east of the Pawnees, or in the Shakaskia country.

On the 2d of January, 1878, Inspector Watkins reported that "The Indians all desire to go to the North, to the Shakaskia country, and say that is the country they want." On the 30th of January, 1878, White Eagle, Standing Buffalo, the chief, Frank LaFlesche, chief, telegraphed, "We have selected reservations between Arkansas and Shakaskia rivers. Please certify to selection."

By the Indian appropriation act of May 27, 1878 (20 Stats., p. 76), an appropriation was made for the immediate removal of the Poncas from the Quapaw Reservation, Indian Territory, to a new one west of the Kaw or Kansas, and between the Arkansas and Shakaskia rivers, and for their settlement thereon. In accordance with the provisions of this act, the following tracts of land were assigned the Poncas, viz: Townships 24 and 25 north, range 1 east, and all of townships 24 and 25 north, ranges 2, 3, and 4 east, lying west of the Arkansas River, and containing 101,894.31 acres. By the deficiency appropriation act of March 3, 1881 (21 Stats., p. 422), and appropriation was [fol. 147] made to enable the Secretary of the Interior to secure to the Poncas lands in severalty, on either their old or their new reservation, in accordance with their wishes, $50,000 of which was especially appropriated for the purchase of one hundred and one thousand eight hundred and ninety-four acres of land in the Indian Territory, where most of the Indians are now located; and in September, 1881, the sum of $48,389.46 was placed to the credit of the Cherokee Nation on the books of the Treasury for

the purchase of this land, at 47.49 cents per acre, the price fixed by the President on the 23d of June, 1879.

Michigan

Isabella Reserve

Department of the Interior, Office of Indian Affairs

December 11, 1854.

SIR:

I inclose a copy of a letter from Messrs. George Smith and P. O. Johnson, missionaries of the Methodist Episcopal Church in Michigan, addressed to Rev. Dr. Durbin, and by him forwarded to this office, in relation to certain desired reservations of public lands.

In consideration of certain contemplated arrangements with the Indians in Michigan during the ensuing spring, I have to ask that you reserve from public sale the lands designated in the letter of Messrs. Smith and Johnson.

I have also received a communication from the Rev. J. P. Durbin, corresponding secretary of the Missionary Society of the Methodist Episcopal Church, asking for an additional reservation of lands near Iroquois Point, back from the lake.

For the reasons above, I concur in the request, and ask that several additional sections to those already reserved be made of the lands in the vicinity of Iroquois Point.

Very respectfully, your obedient servant, Geo. W. Manypenny, Commissioner.

John Wilson, Esq., Commissioner of General Land Office.
[Certified.]

[fol. 148] [Defendants' exhibit 6, deed, June 14, 1833, between Cherokee Nation and the United States of America in trust for the Otoe and Missouria Indians, is identical with plaintiff's exhibit 7 which appears at page 129.]

Defendants' Exhibits 7 and 8

II-119 to II-122.

[Defendants' exhibits 7 and 8 are certified copies of plats of survey of T. 23 N., R. 3 E. I. M., Oklahoma, 1872. It is not deemed practicable to insert copies of the survey in the printed record. Copies of the survey are available for the use of the Court.]

Defendants' Exhibit 9

State of Oklahoma,
County of Garfield, ss:

Roy G. Collier, being duly sworn, does hereby certify that he is an engineer in the employ of Champlin Refining Company; that he has carefully computed the acreage as shown on the attached map, lying west of the Arkansas river, using the acreage figures as shown on the map, and that the total number of acres of that portion of Township 23, North, Range 3 East, lying west of the Arkansas River as shown on the said map contains 14099.24 acres.

The number of acres as shown on the map for each section, lot, or fraction thereof are shown on the attached worksheets which I certify to be a true and correct list of the number of acres as shown on the map.

Roy G. Collier, Civil Engineer.

Subscribed and sworn to before me this 11th day of December, 1942. Anna Marie Markes, Notary Public. My Commission Expires June 12, 1946. (Seal.)

[fol. 149] Twp 23 N—R 3E—Pawnee County, Okla

Areas South and West of the "Right" (South) Bank of the Arkansas River—(Not Including Bayou)

Description		Acres
Section	5	155 97
	6	629 02
	7	630 58
	8	453 55
	9	1 22
	15	14 55
	16	258 25
	17	613 80
	18	630 98
	19	630 78
	20	640 00
	21	622 62
	22	570 92
	23	271 23
	24	314 01
	25	640 00
	26	640 00
	27	640 00
	28	640 00
	29	640 00
	30	631 10
	31	630 66
	32	640 00
	33	640 00
	34	640 00
	35	640 00
	36	640 00
		14 099.24

[fol. 150] TWP 23N—R3E—Pawnee County, Okla.

Areas South and West of the "Right" (South) Bank of the Arkansas River—Not Including the "Bayou"

Description			Acres	
SW¼ Sec. 5-23N-3E	Lot	7	3 92	
	"	8	48 95	
	"	9	42 65	
NW¼ Sec. 5-23N-3E	"	10	36 25	
	"	11	24 20	155 97
NE¼ Sec 6-23N-3E	Lot	1	40 87	
	"	2	40 62	
		S½	80 00	
NW¼ Sec 6-23N-3E	Lot	3	40 37	
	"	4	36 24	
	"	5	36 56	
		SE¼	40 00	
SW¼ Sec 6-23N-3E	Lot	6	36 97	
	"	7	37 39	
		E½	80 00	
SE¼-Sec 6-23N-3E			160 00	629 02
NE¼-Sec. 7-23N-3E			160 00	
NW¼ Sec 7-23N-3E		E½	80 00	
	Lot	1	37 61	
	"	2	37 63	
SW¼Sec. 7-23N-3E	Lot	3	37 66	
	"	4	37 68	
		E½	80 00	
SE¼-Sec 7-23N-3E			160 00	630 58
N½ Sec. 8-23N-3E	Lot	5	27 48	
	"	6	31 20	
	"	11	37 15	
	"	12	40 15	
	"	13	37 70	
S½ Sec. 8-23N-3E	"	4	13 24	
	"	7	39 98	
	"	8	40 00	
	"	9	33 97	
	"	10	33 33	
	"	14	41 25	
	"	15	41 80	

[fol. 151]

Description						Acres	
Sec. 8	38.60	9.87	13.24	27.48	31.20		
502.02-(Lots	1,	2,	4,	5,	6,		
	39.98	40.00	33.97	33.33	37.15	40.15	
	7,	8,	9,	10,	11,	12,	
	37.70	41.25	41.80				
	13,	14,	15)=		Lot 3	36 36	453 55
SW¼-Sec.	9-23N-3E				Lot 4	1 22	1 22
SW¼ "	15-23N-3E				Lot 5	11 20	
					" 6	3 20	
					" 7	15	14 55
NW¼-Sec.	16-23N-3E				Lot 1	14 62	
					" 2	34 42	
SW¼-Sec.	16-23N-3E				" 3	24 42	
					" 8	39 42	
					" 9	11 70	
					" 10	22 04	
					NW¼	40 00	
SE¼-Sec.	16-23N-3E				Lot 4	21 40	
					" 5	9 65	
					" 6	18 70	
					" 7	21 88	258 25
NE¼-Sec.	17-23N-3E				N½	80 00	
					Lot 8	39 68	
					" 9	29 24	
NW¼-Sec.	17-23N-3E				" 1	38 42	
					" 2	21 50	
					" 10	13 70	
					" 11	36 80	
					SW¼	40 00	
SW¼-Sec.	17-23N-3E					160 00	
SE¼-Sec.	17-23N-3E				SW¼	40 00	
					Lot 3	46 67	
					" 4	10 04	
					" 5	24 28	
					" 6	9 40	
					" 7	24 07	613.80
NE¼-Sec.	18-23N-3E					160 00	
SE¼-Sec.	18-23N-3E					160 00	
NW¼-Sec.	18-23N-3E				E½	80 00	
					Lot 1	37 71	
					" 2	37 73	

[fol. 152]

Description		Acres	
SW¼-Sec. 18-23N-3E	E½	80 00	
	Lot 3	37 76	
	" 4	37 78	630 98
NE¼-Sec. 19-23N-3E		160 00	
SE¼-Sec. 19-23N-3E		160 00	
NW¼-Sec. 19-23N-3E	E½	80 00	
	Lot 1	37 77	
	" 2	37 72	
SW¼-Sec. 19-23N-3E	E½	80 09	
	Lot 3	37 67	
	" 4	37 62	630 78
All Sec. 20-23N-3E		640 00	640 00
NE¼-Sec. 21-23N-3E	Lot 1	35 88	
	" 2	6 22	
	" 3	32 24	
	W½	80 00	
NW¼-Sec. 21-23N-3E		160 00	
SW¼-Sec. 21-23N-3E		160 00	
SE¼-Sec. 21-23N-3E	Lot 4	28 28	
	W½	80 00	
	SE¼	40 00	622 62
Section 22-23N-3E	Lot 1	2 75	
	" 2	35 20	
	" 3	38 20	
	" 4	27 80	
	" 5	15 85	
	" 7	45 74	
	" 8	48 36	
	" 9	47 68	
	" 10	41 70	
	" 11	31 06	
	" 12	24 68	
	" 13	25 00	
	" 14	26 90	
	S½SW¼	80 00	
	S½SE¼	80 00	570 92
NW¼-Sec. 23-23N-3E	Lot 12	25 35	
SE¼ of NW¼ and NE¼ of SW¼ and NW¼ of SE¼-Sec. 23	" 10	24 92	
SW¼-Sec. 23-23N-3E	Lot 8	13 24	
	" 9	14 60	
	" 11	18 80	
	S½	80 00	

[fol. 153]

Description		Acres	
SE¼-Sec. 23-23N-3E	Lot 6	5 20	
	" 7	9 12	
	S½	80 00	
SW¼-Sec. 24-23N-3E	Lot 7	23 84	
	" 8	12 72	
	S½	80 00	271 23
SE¼-NE¼ Sec. 24-23N-3E	Lot 5	32 00	
SW¼ of NE¼ and NW¼ of SE¼-Sec. 24	" 6	45 45	
SE¼-Sec. 24-23N-3E	NE¼	40 00	
	S½	80 00	314 01
All Sec. 25-23N-3E		640 00	640 00
All Sec. 26-23N-3E		640 00	640 00
All Sec. 27-23N-3E		640 00	640 00
All Sec. 28-23N-3E		640 00	640 00
All Sec. 29-23N-3E		640 00	640 00
NE¼-30-23N-3E		160 00	
NW¼-30-23N-3E	E½	80 00	
	Lot 1	37 64	
	" 2	37 73	
SW¼-30-23N-3E	E½	80 00	
	Lot 3	37 82	
	" 4	37 91	
SE¼-30-23N-3E		160 00	631 10
NE¼-31-23N-3E		160 00	
NW¼-31-23N-3E	E½	80 00	
	Lot 1	37 88	
	" 2	37 74	
SW¼-31-23N-3E	E½	80 00	
	Lot 3	37 59	
	" 4	37 45	
SE¼-31-23N-3E		160 00	630 66
All Sec. 32-23N-3E		640 00	640 00
All Sec. 33-23N-3E		640 00	640 00
All Sec. 34-23N-3E		640 00	640 00
All Sec. 35-23N-3E		640 00	640 00
All Sec. 36-23N-3E		640 00	640 00
			14 099 24

[fol. 154] [The plat, which appears as part of defendants' exhibit 9, survey of T. 23 N., R. 3 E. I. M., Oklahoma, 1872, is not deemed practicable of insertion in copies of the

printed record. Copies of the plat are available for the use of the Court.]

DEFENDANTS' EXHIBIT 9 A

Affidavit

STATE OF OKLAHOMA,
County of Pawnee, ss:

O. F. Sewell, County surveyor of Pawnee County, Oklahoma, being duly sworn does hereby certify that he has carefully computed the acreage as shown on the attached United States survey of Township 23 North, Range 3 East of the Indian Meridian, which survey is dated September 16, 1872;

That in computing the said acreage, affiant has used the figures as shown on the attached survey, and that the acreage figures on the said survey show that the total number of acres within that portion of Township 23 North, Range 3 East, lying west of the Arkansas River, is 14,099.24 acres.

The number of acres as shown on the attached survey for each section, lot, or fraction thereof of said Township 23, North, Range 3 East, lying west of the Arkansas River, is shown on the attached work sheets, which I certify to be a true and correct computation of the acreage above described.

O. F. Sewell, County Engineer of Pawnee County, Oklahoma.

Subscribed and sworn to before me this 23rd day of November, 1943. Ruth Jones, Notary Public. My Commission Expires: May 16, 1947. (Seal.)

[fol. 155] Twp 23 North, Range 3 EIM, Pawnee County Oklahoma area south and west of the right (south) bank of the Arkansas River (Not including Bayou).

Description	Acres
Section 5	
Lot 11	29.20
" 10	36.25
" 9	42.65
" 8	43.95
" 7	3.92
Total	155.97
Section 6	
Lot 1	40.87
" 2	40.62
" 3	40.37
" 4	36.24
" 5	36.56
" 6	36.97
" 7	37.39
SE-NW¼	40.00
S½-NE¼	80.00
E½-SW¼	80.00
All SW¼	160.00
Total	629.02
Section 7	
Lot 1	37.61
" 2	37.63
" 3	37.66
" 4	37.68
E½-NW¼	80.00
E½-SW¼	80.00
All NE¼	160.00
" SW¼	160.00
Total	630.58
Section 16	
Lot 1	14.62
" 2	34.42
" 3	24.42
" 4	21.40
" 5	9.65
" 6	18.70
" 7	21.88
" 8	39.42
" 9	11.70
" 10	22.04
NW-SW¼	40.00
Total	258.25
Section 17	
Lot 1	38.42
" 2	21.50
" 3	46.67
" 4	10.04
" 5	24.28
" 6	9.40
" 7	24.07
" 8	39.68
" 9	29.24
" 10	13.70
" 11	36.80
SW-NW¼	40.00
N½-NE¼	80.00
SW-SE¼	40.00
All SW¼	160.00
Total	613.80

[fol. 156]

Description	Acres
Section 8	
Lot 3	36.30
" 4	13.24
" 5	27.48
" 6	31.20
" 7	39.98
" 8	40.00
" 9	33.97
" 10	33.33
" 11	37.15
" 12	40.15
" 13	37.70
" 14	41.25
" 15	41.80
Total	453.55
Section 9	
Lot 4	1.22
Total	1.22
Section 15	
Lot 5	11.20
" 6	3.20
" 7	0.15
Total	14.55

Description	Acres
Section 18	
Lot 1	37.71
" 2	37.73
" 3	37.76
" 4	37.78
All NE¼	160.00
E½-NW¼	80.00
E½-SW¼	80.00
All SE¼	160.00
Total	630.98
Section 19	
Lot 1	37.77
" 2	37.72
" 3	37.67
" 4	37.62
E½-NW¼	80.00
E½-SW¼	80.00
All NE¼	160.00
All SE¼	160.00
Total	630.78
All Section 20	640.00

[fol. 157] Twp 23 North, Range 3 EIM, Pawnee County Oklahoma area south and west of the right (south) bank of the Arkansas River (not including Bayou).

Description	Acres
Section 21	
Lot 1	35.88
" 2	6.22
" 3	32.24
" 4	28.28
SE-SE¼	40.00
W½-SE¼	80.00
W½-NE¼	80.00
All NW¼	160.00
All SW¼	160.00
Total	622.62
Section 22	
Lot 1	2.75
" 2	35.20
" 3	38.20
" 4	27.80
" 5	15.85
" 7	45.74
" 8	48.36
" 9	47.68
" 10	41.70
" 11	31.06
" 12	24.68
" 13	25.00
" 14	26.90
S½-SE¼	80.00
S½-SW¼	80.00
Total	570.92

Description	Acres
Section 30	
Lot 1	37.64
" 2	37.73
" 3	37.82
" 4	37.91
E½-NW¼	80.00
E½-SW¼	80.00
All NE¼	160.00
All SE¼	160.00
Total	631.1
Section 31	
Lot 1	37.88
" 2	37.74
" 3	37.59
" 4	37.45
E½NW¼	80.00
E½SW¼	80.00
All NE¼	160.00
All SE¼	160.00
	630.66
All Section 32	640.00
" " 33	640.00
" " 34	640.00
" " 35	640.00
" " 36	640.00
Grand Total	14,099.24

[fol. 158]

Description	Acres	Description	Acres
Section 23			
Lot 6	5.20		
" 7	9.12		
" 8	13.24		
" 9	14.60		
" 10	24.92		
" 11	18.80		
" 12	25.35		
S½-SE¼	80.00		
S½-SW¼	80.00		
Total	271.23		
Section 24			
Lot 5	32.00		
" 6	45.45		
" 7	23.84		
" 8	12.72		
NE-SE½	40.00		
S½-SE¼	80.00		
S½-SW¼	80.00		
Total	314.01		
All Section 25	640.00		
" " 26	640.00		
" " 27	640.00		
" " 28	640.00		
" " 29	640.00		

[The plat, which appears as part of defendants' exhibit 9-A, is identical with the plat which appears as part of defendants' exhibit 9, reference to which is made at page 154, this record.]

[fol. 159] DEFENDANTS' EXHIBITS 10, 11, 12, 13 and 14

[Defendants' exhibit 10 is an agreement between United States of America and the Pawnee Tribe of Indians (Kappler Indian Affairs, Laws and Treaties, Vol. 1, pages 496 to 498.) Defendants' exhibit 11 is Act of March 3, 1893, 27 Stat. 557, Secs. 12-13 (Pawnee Indian lands) Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 496. Defendants' exhibit 12 is articles of agreement, December 19, 1891, between United States of America and Cherokee Nation (Kappler Indian Affairs, Laws and Treaties, Vol. 1, pages 490 to 492). Defendants' exhibit 13 is Act of March 3, 1893, 20 Stat. 557, Sec. 10 (Cherokee outlet) Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 489. Defendants' exhibit 14 is a proclamation by the President of the United States, August 19, 1893, 28 Stat. 1222 (Kappler Indian Affairs, Laws and Treaties, Vol. 1, pages 967, 969 and 971. The court by order of May 26, 1945, authorized reference to these exhibits without them being printed.]

DEFENDANTS' EXHIBIT 15

Certificate

Phil R. Hawkins does hereby certify that he is chairman of the Board of Administration of the State of Kansas and that as such official, he has custody of all of the records of the State with reference to the oil and gas leases covering the bed of the Arkansas River within the State of Kansas, and that he is familiar with the title of the bed of such River.

It Is Further Certified that the State of Kansas is the owner of the bed of the Arkansas River throughout its entire length within the limits of the State of Kansas, and that as such owner, the State of Kansas has executed oil and gas leases covering the bed of such River within the following counties of Kansas to-wit: Sumner; Reno; Barton; Rice; Cowley; Pawnee; Kearney; Sedgwick; and others

[fols. 160-162] It Is Further Certified that production of oil or gas is now being obtained from such leases in the following counties to-wit by the following lessees of the State of Kansas; Derby Oil Company, Barton Co.; Phillips Petroleum Company, Shell Oil Company, Inc., Sumner;

Standard Oil Co., Barton Co.; Consolidated Gas Company, Rice Co.; Vickers Petroleum Co., Rice Co.

It Is Further Certified that the oil and gas royalties and rentals from the above described leases covering the bed of the Arkansas River, are now, and have at all times been paid to the State of Kansas, and that the title to the bed of the said River and to the royalties and rentals therefrom has not been contested by any producing or pipeline company or any other party since the River was many years ago declared navigable by the Supreme Court of the State.

Phil R. Hawkins, Chairman, State Board of Administration.

Subscribed and sworn to before me this 12th day of October, 1943. Irma Walsh, Notary Public. My commission expires March 8, 1945. (Seal.)

Mr. Dean: (The Arkansas River was declared navigable April 6, 1912 in Hurst v. Dana, 86 Kan. 947; 122 P. A. C. 1041.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 163] In United States Circuit Court of Appeals, Tenth Circuit

Record Entry: Cause Argued and Submitted

First Day, May Term, Monday, May 20th, A. D. 1946.

Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Franklin E. Kennamer, District Judge

This cause came on to be heard and was argued by counsel, Fred W. Smith, Esquire, appearing for appellant, Nathan Scarritt, Esquire, and Harry Glasser, Esquire, appearing for appellees.

Thereupon this cause was submitted to the court.

In United States Circuit Court of Appeals, Tenth Circuit

Fred W. Smith, Atty., Dept. of Justice (J. Edward Williams, Acting Head, Lands Div., Dept. of Justice, Whit Y. Mauzy, U. S. Atty., and Roger P. Marquis, Atty., Dept. of Justice, were with him on the briefs) for appellant.

Nathan Scarritt and Harry O. Glasser (Mac Q. Williamson, Atty. Gen., Randall S. Cobb, Atty. Gen., J. Walker Field, Asst. Atty. Gen., Walter Marlin, Law and Exe-. Counsel for the Commissioners of the Land Office, State of Oklahoma, and E. S. Champlin were with them on the briefs) for appellees.

Coleman Hayes, R. B. F. Hummer, D. E. Hodges, Edward Howell, E. R. McNeill, N. E. McNeill, J. A. McCollum, and Roy C. Lytle filed a brief amici curiae.

Before Phillips and Murrah, Circuit Judges, and Kennamer, District Judge

Opinion—July 29, 1946

Phillips, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree adjudging that the State of Oklahoma is the owner of the south half of the Arkansas [fol. 164] River bed, in Oklahoma, adjoining four riparian tracts of land, which tracts the United States holds under trust patents for the benefit of certain of its Pawnee and Otoe Indian wards, and that the Champlin Refining Company has a valid and subsisting oil and gas lease upon such south half of the river bed.

The United States originally acquired title to the land in suit as part of the Louisiana Purchase. Under treaties of May 6, 1828,[1] February 14, 1833,[2] and December 29, 1835,[3] the United States, by deed dated December 31, 1838, conveyed to the Cherokee Nation a large tract of land on both sides of the bed of the Arkansas River, embracing the south half of the river bed here in suit. By the treaty of July 19, 1866[4] the Cherokee Nation agreed that the United States

[1] 7 Stat. 311.
[2] 7 Stat. 414.
[3] 7 Stat. 478.
[4] 14 Stat. 799.

might settle friendly Indians upon that part of the Cherokee lands known as the Cherokee Outlet, which embraced the portions of the river bed here in suit. Article 16 of that treaty provided that such lands would be conveyed to the Indians so settled. By treaty of October 28, 1867,[5] a reservation was set aside for the Cheyenne and Arapahoe Indians between the Cimarron and Arkansas Rivers. That reservation embraced the portions of the river bed here in suit. It was expressly extended to the middle of the Arkansas River. The Cheyenne and Arapahoe Indians declined such reservations and relinquished their claim. On June 5, 1872,[6] Congress authorized the Cherokee Nation to convey to the Osage Nation a tract of land described as follows: "Bounded • • • on the south and west by the north line of the Creek country and the main channel of the Arkansas River, • • •" The conveyance was made. It included the land on the opposite side of the river at approximately the location of the four riparian tracts and the title of the Osage Nation to the [fol. 165] north half of the river bed was upheld in subsequent litigation between the United States and the State of Oklahoma.[7]

The land on both sides of the Arkansas River at the location of the portions of the river bed here in suit was first surveyed into sections, townships, and ranges in September, 1872. The survey was approved on September 16, 1872.

Two of the riparian tracts are in Township 23 North, Range 4 East of the Indian Meridian. These tracts are held in trust for Pawnee Indians. The other two riparian tracts are located in Township 23 North, Range 3 East of the Indian Meridian. These tracts are held in trust for Otoe Indians.

Under the 1866 treaty with the Cherokees, and pursuant to the Act of March 3, 1881,[8] the Secretary of the Interior

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[5] 15 Stat. 593, 594.

[6] 17 Stat. 228.

[7] See United States v. Brewer-Elliott Oil & Gas Co., 249 F. 609;
Brewer-Elliott Oil & Gas Co. v. United States, 270 F. 100;
Brewer Elliott Oil & Gas Co. v. United States, 260 U. S. 77.

[8] 21 Stat. 380.

designated and assigned for the use and occupation of the Confederated Otoe and Missouria tribes of Indians "that portion of Tp. 23, N. R. 3 E. lying west of the Arkansas River. * * *"[9] Pursuant to the 1866 treaty with the Cherokees, and in conformity with the Act of March 3, 1883,[10] the Cherokee Nation, on June 14, 1883, conveyed to the United States in trust for the use and benefit of the Otoe and Missouria Indians: "Fractional township twenty-three (23) North, range three (3) East of the Indian Meridian: lying and being on the right bank of the Arkansas River, according to a plat of said lands hereto annexed, marked 'A,' and made a part of this conveyance * * *."[11] On November 24, 1906, a trust patent was issued to Ethel Lewis Barnes, an Indian of the Otoe and Missouria tribes, covering the following described land: "The South half and the North East quarter of the South East Quarter and the Lot numbered five of Section twenty-four, in Township twenty-three North of Range three East, of Indian Meridian in Oklahoma, con- [fol. 166] taining one hundred and fifty-two acres and twenty hundredths of an acre." The title to such land is now held by the United States in trust for Ethel Lewis Barnes. On June 10, 1907, a trust patent was issued to Anna Robedeaux, an Indian of the Otoe and Missouria tribes, covering the following described land: "* * * Lot numbered six of Section twenty four in Township twenty three North of Range three East of Indian Meridian in Oklahoma, * * *" Title to that land is now held by the United States in trust for the heirs of Anna Robedeaux. Both of these allotments are bounded by the Arkansas River.

By § 4 of the Act of April 10, 1876,[12] there was set aside as a reservation for the Pawnee Tribe of Indians, in accordance with the 1866 treaty with the Cherokees, the following described land: "All that tract of country between the Cinnarron [Cimarron] and Arkansas Rivers embraced within the limits of townships * * * twenty three, * * * of

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[9] Other townships, not here involved, were also included.

[10] 22 Stat. 603, 624.

[11] Other townships, not here involved, were also included.

[12] 19 Stat. 28, 29.

range four east, * * * of the Indian meridian," [13] In accordance with the 1866 treaty with the Cherokees, and pursuant to the provisions of the Act of March 3, 1883,[14] the Cherokee Nation, on June 14, 1883, conveyed to the United States in trust for the use and benefit of the Pawnee Tribe of Indians the following described land: "* * * fractional townships twenty-three (23) * * * north, range four (4) east; * * *" [15] The fractional townships referred to in this deed are described as "* * * the fractional townships being on the right bank of the Arkansas River." By agreement between the Pawnee Tribe and the United States, made November 23, 1892,[16] the Pawnee Tribe ceded and relinquished to the United States its beneficial interest in such reservation. Art. II of such agreement provided for the making of allotments to individual Pawnee Indians. Thereafter, on October 9, 1893, there was issued to Horace Field, a Pawnee Indian, a trust patent covering the following described lands: "The South East quarter of the [fol. 167] North West quarter, and the Lots numbered one, two and three of Section nineteen in Township twenty-three North of Range four East of the Indian Meridian, in Oklahoma Territory, containing one hundred and twenty-one acres and sixty-six hundredths of an acre." Title to that tract is now held by the United States in trust for four Indians to whom it passed by descent. On October 9, 1893, a trust patent was issued to William Bayhylle, a Pawnee Indian, covering the following described land: "The west half of the northeast quarter of section twenty and the southwest quarter of the southeast quarter and the lot numbered six of section seventeen in Township twenty-three north of Range four east of the Indian Meridian, Oklahoma Territory containing one hundred and twenty-nine acres." Title to that tract is now held by the United States in trust for eight Indians to whom it passed by descent. These two Pawnee allotments are also bounded by the Arkansas River.

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[13] Other townships, not here involved, were included in the reservation.

[14] 22 Stat. 603, 624.

[15] Many other tracts, not here involved, were also included.

[16] I. Kappler, Indian Affairs, Laws and Treaties, 496-498.

All four of the trust patents were issued under § 5 of the General Allotment Act of February 8, 1887,[17] and the trust period has been extended by Executive Orders as provided therein.

The portions of the river bed in suit were situated in Oklahoma Territory. The State of Oklahoma was admitted into the Union on November 16, 1907. All of the allotments were made prior to statehood.

On July 20, 1942, the State of Oklahoma executed two oil and gas leases in favor of Champlin Refining Company, covering the south half of the Arkansas River bed for a considerable distance, including the area of the river bed adjoining the four riparian tracts, and the Champlin Refining Company has drilled one well which is producing in commercial quantities.

On July 13, 1943, the United States commenced the instant action against the Champlin Refining Company, to enjoin it from trespassing upon the river bed and drilling for oil and gas thereunder, and for a decree canceling the lease and quieting the title in the United States, its allottees, and their heirs. The State of Oklahoma intervened in the action. [fol. 168] On September 16, 1944, a stipulation was entered into to the effect that it should be considered that the United States had introduced evidence showing the Arkansas River to be nonnavigable in fact at the location of the river bed in controversy on all dates material in this case.

The trial court found that the patents neither expressly included nor excluded the river bed and that the river, at all times material to the controversy, at the locations of the riparian tracts, was nonnavigable in fact.

In the case of State v. Nolegs, 40 Okl. 479, 139 P. 943, decided in 1914, the court took judicial notice of the fact that the Arkansas River was navigable, and held that the title of patentees to adjoining lands extended only to the high water mark of the stream. The land there involved was a homestead entry. The date of the patent is not disclosed.

The trial court held that the State had power to declare rivers navigable and to limit the title of riparian owners to

[17] 24 Stat. 388, 389.

the high water mark of the river, except where title to the river bed has been expressly granted by the United States prior to statehood, and that it was bound by the decision in State v. Nolegs, supra.

In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within a state passes to such state upon its admission into the Union, if the rivers are then navigable. If they are not then navigable, the title to the river beds, if a part of the public domain, remains in the United States. The question of navigability is determinative and is a Federal question.[18]

It is settled Federal law that streams or lakes which are navigable in fact are navigable in law and, conversely, if they are not navigable in fact, they are not navigable in law.[19]

Grants by the United States of its public lands bounded on streams or other waters, navigable, or nonnavigable, [fol. 169] made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. As regards such conveyances, the United States assumes the position of a private owner, subject to the general law of the state.[20] Where it is disposing of tribal lands of Indians under guardianship, the same rule applies.[21]

The question here presented is what title passed by the patents when they were issued in 1906 and 1907, prior to the admission of Oklahoma into the Union.[22]

Oklahoma could not adopt a retroactive rule for determining navigability which would destroy a title already accrued under Federal law and grant, or would enlarge what actually passed to Oklahoma at the time of her admission under the constitutional rule of equality.

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[18] United States v. Utah, 283 U. S. 64, 75;
United States v. Oregon, 295 U. S. 1, 14.

[19] United States v. Holt Bank, 270 U. S. 49, 56;
Oklahoma v. Texas, 258 U. S. 574, 586.

[20] Hardin v. Shedd, 190 U. S. 508, 519;
Hardin v. Jordan, 140 U. S. 371, 384;
Whitaker v. McBride, 197 U. S. 510, 512.

[21] Oklahoma v. Texas, 258 U. S. 574, 595.

[22] Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 87.

In Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 86, the court said:

"It is a natural inference that Congress in its grant to the Osage Indians in 1872 made it extend to the main channel of the river, only because it knew it was not navigable. This would be consistent with its general policy. Rev. Stats., § 2476; Oklahoma v. Texas, 258 U. S. 574; Scott v. Lattig, 227 U. S. 229, 242; Railroad Company v. Schurmeir, 7 Wall. 272, 289. If the Arkansas River is not navigable, then the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant expressly carry the title to that line.

"But it is said that the navigability of the Arkansas River is a local question to be settled by the legislature and the courts of Oklahoma, and that the Supreme Court of the State has held that at the very point here in dispute, the river is navigable. State v. Nolegs, 40 Okla. 479. A similar argument was made for the same purpose in Oklahoma v. Texas, supra, based on [fol. 170] a decision by the Supreme Court of Oklahoma as to the Red River. Hale v. Record, 44 Okla. 803. The controlling effect of the state court decision was there denied because the United States had not been there, as it was not here, a party to the case in the state court. Economy Light & Power Co. v. United States, 256 U. S. 113, 123. In such a case as this the navigability of the stream is not a local question for the state tribunals to settle. The question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made, and that was thirty-five years before Oklahoma was taken into the Union and before there were any local tribunals to decide any such questions. As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property

of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of the title. It is not for a State by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked. . . . .

"Some States have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on non-naviga- [fol. 171] bility of the stream in fact. In such a case, navigability *vel non* is not a local question."

At the time the grants were made, the common law was in effect in Oklahoma Territory.[23]

Under the rules of the common law, unless a contrary intention appears or is clearly inferable from the terms of the grant, the grantee of land, bounded by a nonnavigable stream or river, acquires title to the land to the center or thread of the water, on the theory that the grantor will not be presumed to have reserved a strip of land covered by water which will be of no practical value to him.[24]

In Oklahoma v. Texas, 258 U. S. 574, 595, 596, the patents to Indian allottees of the uplands adjoining the nonnavigable river contain no express inclusion or exclusion of the river bed. The Supreme Court held that, under the common law, the patents conveyed the title to the middle of the stream

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[23] St. 1893, § 3874; St. 1903, § 4200; Compiled Laws, 1909, § 5534; 12 Okl. St. Ann., § 2; Hoppe Hardware Co. v. Bain, 21 Okl. 177, 95 P. 765, 767; McKennon v. Winn, 1 Okl. 327, 33 P. 582, 584, 585.

[24] Oklahoma v. Texas, 258 U. S. 574, 595; United States v. Elliott, 10 Cir., 131 F. 2d 720, 723, and cases there cited; Note, 74 A. L. R. 599.

and rejected the contention that the common law rule had been impliedly abrogated in Oklahoma.

In United States v. Elliott, 10 Cir., 131 F. 2d 720, 723, the court said:

> "• • • At the time the United States made the grant to the Seneca and Shawnee Indians, the lands granted were not within a state or other local jurisdiction. The grant, therefore, was not subject to local law. It must be construed in accordance with the principles of the common law and the decisions of the United States Supreme Court. • • • Under the common law and decisions of the United States Supreme Court, a grant of land bounded on a nonnavigable river carries [fol. 172] the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river."

We conclude that when the trust patents were issued, they conveyed the title to the center of the Arkansas River and that the State of Oklahoma could not, by legislative fiat or judicial decision, take from the Indian allottees what the United States had conveyed to them before statehood.[25]

Wear v. Kansas, 245 U. S. 154, is heavily relied upon by the State and the Champlin Refining Company. An examination of the opinion in that case in the Supreme Court of Kansas, where it was entitled "State v. Akers,"[26] discloses that the court took judicial notice of the fact that the Arkansas River and the Kansas River were navigable in Kansas, and held that the test of navigability in law is navigability

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[25] See Coovert v. O'Connor (Pa.), 8 Watts, 470; Allen v. Weber, 80 Wis. 531, 50 N. W. 514.

In the last-mentioned case the court said:

> "The declaration made by the legislature of 1868, that Fox river is a navigable stream, could not possibly affect the rights of the owners of the dam, acquired long before, or make the dam navigable, or any other part of Fox river in any other sense than mere theory. The defendants' rights are fixed by their deeds, and that act certainly could not change them in the least."

[26] 92 Kan. 169, 140 P. 637.

in fact. All that the Supreme Court of the United States held in the Wear case was that it was not error for the Supreme Court of Kansas, under the circumstances there presented, to determine, by the process of judicial notice, that the rivers were navigable in fact. Here, the trial court, from the stipulated facts, found that the river was nonnavigable in fact. The Supreme Court of Oklahoma could not, by a judgment to which neither the United States nor the heirs of the Indian Allottees were parties, adjudge that the river was navigable and bind the United States and the heirs of Indian allottees by such adjudication.[27]

[fols. 173-176] The judgment is Reversed and the cause Remanded with instructions to enter a judgment as prayed for in the complaint of the United States.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

JUDGMENT

Fortieth Day, May Term, Monday, July 29th, A. D. 1946. Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable F. E. Kennamer, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with instructions to enter judgment as prayed for in the complaint of the United States of America.

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[27] See Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 87; Oklahoma v. Texas, 258 U. S. 574, 591.

[fol. 177] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR REHEARING—Filed August 17, 1946

Come now the appellees and respectfully move the Court that it grant a rehearing in this cause and as grounds therefor, allege and state, as follows:

The Court, in its opinion herein, did not rule upon or mention one of the principal defenses raised by the appel-
[fol. 178] lees in their answers filed in the court below, and such defense may not have been considered by this Court.

This defense is stated in the Amendment to the Intervening Answer of the State of Oklahoma as follows (R. 29):

> "For amendment to its intervening answer filed herein, the State of Oklahoma on relation of the Commissioners of the Land Office alleges that the United States Supreme Court has confirmed the right of the State of Kansas to declare the rivers within its borders as navigable rivers, and has confirmed the title of the State in and to the bed of such rivers.
>
> "The State of Kansas has declared the Arkansas River to be navigable within its boundaries and the title of the State of Kansas to the bed of such river has never been disputed because of the decision of the United States Supreme Court above mentioned, the bed of said river having been a portion of the public domain of the United States at the time of the admission of the State of Kansas into the Union.
>
> "The claim of the plaintiff that a different rule should be applied to that portion of the bed of the Arkansas River which was a part of the public domain of the United States within the boundaries of Oklahoma would be a denial to the State of Oklahoma and to this defendant of the equal protection of the laws in violation of the Constitution of the United States."

A similar answer was filed by the appellee, Champlin Refining Company (R. 28).

Evidence was introduced in support of the above quoted defense showing that the State of Kansas has asserted title to the bed of the Arkansas River for many years, that it has executed many oil and gas leases thereon, similar to
[fol. 179] the lease executed by the State of Oklahoma in

the present action, that its lessees have produced great quantities of oil from the bed of the Arkansas River and that the State of Kansas has received substantial royalties from such production, as well as from other uses, through the years.

The undisputed and inescapable fact is that the State of Kansas is enjoying and for many years has had, and profited by, the unrestricted ownership of the bed of the Arkansas River, whereas, the decision of this Court (under circumstances practically identical) would deny to the State of Oklahoma the same right.

The State of Oklahoma has entered this Court, clothed with all of the attributes of a sovereign state of the United States of America, and has duly and formally raised the defense in this action that the denial of such privilege conflicts with the Constitutional doctrine of equality of states. The Champlin Refining Company, a private citizen, has also raised the defense of the equal protection of the laws under the Federal Constitution.

Both appellees earnestly feel that they are entitled to an analysis of, and a ruling on this defense and we may state that, in the humble opinion of counsel, the question as to whether the State of Oklahoma will receive equal treatment with the State of Kansas, transcends other issues in this case.

In asking this Honorable Court to rule upon this defense, the appellees respectfully contend that the decision of this [fol. 180] Court deprives the State of Oklahoma and its interested citizens of equality with the State of Kansas for the reason that the United States Supreme Court in *Wear* v. *Kansas*, 245 U. S. 154, allowed the State of Kansas to appropriate the bed of the Kansas River under identical circumstances as those existing in the present case.

This Court has stated as the basis of its opinion in the case at bar:

> "We conclude that when the trust patents were issued, they conveyed the title to the center of the Arkansas River, and that the State of Oklahoma could not, by legislative fiat or judicial decision, take from the Indian allottees what the United States had conveyed to them before statehood."

In order to arrive at this conclusion of a United States *conveyance* of stream bed, it is, as we see it, quite necessary

by purely judicial construction to read into the government patents herein something that the Federal issuing officers did not see fit to put in them, namely the right to additional lands in the stream bed. It should be borne in mind that prior governmental surveys "meandered" the stream bed on the official plats and caused fractional subdivisions and quarter sections adjacent and abutting the river to be called "Lots," and the survey showed deductions of acreage therefrom on account of its being beyond the south bank and in the stream bed. So show the official governmental surveys.

Seeking a rule of interpretation of Federal patents disposing of riparian lands, we find, in *Oklahoma* v. *Texas*, 258 U. S. 574 at Pages 594-595, the following:

> [fol. 181] "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. *If by* a treaty or statute or *the terms of its patent* it is shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. Where it is disposing of tribal land of Indians under its guardianship, the same rules apply" (Emphasis ours).

In this connection it is remembered that in *Oklahoma* v. *Texas, the entire stream bed* of the Red River belonged to the United States, which saw fit, however, to specify precisely "the mid-channel" or the "middle of the main channel" of the river (Pages 592-593). Thus the riparian claims for territory beyond the *stated boundaries* of the tract fell, in the *Oklahoma-Texas case*, as we think they should fall here. There was no question about the government's grantees being held to the strict wording of the area description and said opinion goes on to hold that "the southerly half of the (Red River) bed had not been included in the reservation or the Big Pasture, and was not subjected

to the operation of the Act of 1900, or that of 1906." And then occurs this significant language: "*This shows that the United States intended to retain* that part of the bed." By the same rule the same failure to mention or include the [fol. 182] river bed in the instant cases, should provoke a similar conclusion here.

We would be the first to concede that if the United States had actually conveyed the river bed to these Indian allottees before statehood, the State of Oklahoma could not by legislative fiat, judicial decision or any other means take the river bed from them, *but the Supreme Court of the United States, in Wear* v. *Kansas, expressly held that a similar patent did not convey any portion of the river bed to the Indian allottee.*

Every material fact involved in the issuance of the patent in Wear v. *Kansas is identical with the facts relied upon by appellants in the case at bar.* To this is added the important circumstance that whereas there was no law in existence which declared the Arkansas river non-navigable at the time the riparian owners in the case at bar received their patents, there was a Territorial law declaring the Kansas River to be non-navigable at the time the riparian owner in *Wear* v. *Kansas* received his patent.

It is true that the patents in the case at bar were issued before statehood. So was the patent in *Wear* v. *Kansas.*

It is true that the patents in the case at bar were issued to the Indian wards of the government. So was the patent in *Wear* v. *Kansas.*

It is true that at the time the patents were issued in the case at bar, the common law was in effect in the Oklahoma Territory. The common law was likewise in effect in the [fol. 183] *Kansas Territory at the time the patent was issued in Wear* v. *Kansas.*

It is true that the Arkansas River in the case at bar does not meet the Federal test of navigability. Neither did the Kansas River meet the Federal test in *Wear* v. *Kansas.*

The riparian owners in the present case have asked this Court to hold that the common law in effect in Oklahoma Territory governed their riparian rights and extended their ownership to the center of the Arkansas River, and this Court has so held. The riparian owners in *Wear* v. *Kansas* requested the Supreme Court of the United States to hold that the common law in effect in the Kansas Territory governed their riparian rights and extended their

ownership to the center of the Kansas River, but the Supreme Court refused to so hold, and on the contrary, expressly held that the riparian owner's patent, at the time of its issuance, gave him no right whatsoever in the river bed.

The Supreme Court, in rejecting the contention that the common law governed the patentee's riparian rights, stated:

"In this aspect it is a question of *State law.*"

(Emphasis will be ours throughout unless otherwise noted.)

The Supreme Court then applied the State law which, as in the case at bar, was the exact contrary of the common law of the Territory, and held that the State law deprived the riparian owners of any rights in and to the river bed.

[fol. 184] The appelle-s in the present case earnestly feel that under their plea of Constitutional equality, they are entitled to a ruling showing why this Court should declare that the riparian rights of the patentees of riparian lots in Oklahoma should be governed by Territorial law, when the Supreme Court of the United States has declared that the riparian rights of riparian owners in Kansas are to be governed by the State law.

Furthermore, the navigability of a river must be determined by law, and there was no law in existence which declared the Arkansas River to be non-navigable at the time *the patentees in the case at bar* received their patents, whereas, as above noted, the Territorial Legislature of Kansas had declared the Kansas River to be non-navigable at the time the patentee received his patent in *Wear* v. *Kansas.*

The appellees earnestly feel that under their plea of Constitutional equality, they are entitled to a ruling showing why this Court should cast aside the Oklahoma State rule of navigability in favor of a contrary Federal finding made almost thirty years after the issuance of the patents in question, whereas the Supreme Court of the United States upheld the Kansas State law of navigability over and above a contrary Territorial finding which was in effect at the time of issuance of the patents in the *Wear* v. *Kansas case.*

This Court distinguished *Wear* v. *Kansas* by saying that in the case at bar, the trial court found the river to be

[fol. 185] non-navigable (although the trial court went on to hold that, notwithstanding such finding, the question was one of "State law").

Does this mean that each riparian owner along the banks of the Arkansas River in Kansas may take his case into a Federal court in that State, and if that court finds that the river is non-navigable in fact, establish title to the river bed and thus upset the title of the State?

We respectfully submit that there could be no other conclusion. The common law was in effect in the Kansas Territory just as it was in the Oklahoma Territory, and if a Federal court in Oklahoma can at this late date invoke the common law of the Territory and thereby include lands beyond what was described, merely by finding that the river is not actually navigable, then the Constitutional provision of equality would demand that the Federal courts of Kansas invoke the Territorial law of Kansas whenever they found a river in that State to be non-navigable in fact.

Contrary to the above doctrine, however, the Supreme Court of the United States, in upholding the State rule of property in *Wear* v. *Kansas*, declared that "the fact (of ownership of the river bed) is of a kind that should be established once and for all, *not perpetually retried.*"

The appellees in the present case earnestly feel that, under their plea of Constitutional equality, they are entitled to a ruling, showing why, in Oklahoma, the State's rule of property which it asserted in *State* v. *Nolegs* is to be "retried" in the case at bar, when the Supreme Court [fol. 186] of the United States confirmed "once and for all" the Kansas rule of property asserted by that State in *State* v. *Akers.*

We most sincerely contend that the appellees' plea of Constitutional equality cannot be correctly decided without taking into account the actual conditions existing in the respective States of Oklahoma and Kansas, and the practical result of the Court's decision.

Neither the Arkansas River nor the Kansas River will sustain navigation and everyone knows it. The Kansas Supreme Court knew it, for it said with respect to the Arkansas River:

> "It is not pretended that the river is now navigable in fact in Kansas, and the court, as well as everybody

else knows that it is not. But does this conclude the matter?"

Hurst v. *Dana*, 86 Kan. 947, 112 Pac. 1042.

With respect to the Kansas River the court said:

"For a generation or more land transportation has so far superseded the use of water craft in this region that even the Missouri, a stream known to be navigable in fact and in law, has ceased to float upon its waters along the boundary of this state any appreciable commerce of the country, *and the Kansas, which we have judicially noticed as navigable* (*Wood* v. *Fowler*, 26 Kan. 682, 40 Am. Rep. 330) *floats none at all.*"

Hurst v. *Dana*, 86 Kan. 947, 122 Pac. 1043.

The Supreme Court of the United States knew it, because when that Court upheld *Wear* v. *Kansas* in its opinion in [fol. 187] *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 71, it said:

"Some States have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control."

The inescapable and universally accepted fact is that both rivers are non-navigable under the Federal test of navigability. The State of Kansas nevertheless enjoys the ownership of the beds of both rivers, whereas the State of Oklahoma as to the Arkansas River, is denied such ownership.

We also contend, most earnestly, that in deciding a question as delicate and as extremely important as that of equality between two sovereign states, the law must be taken as it is actually practiced and followed, and as settled and sanctioned by long-standing decision of the highest court in this Union. The decision in *Wear* v. *Kansas* has been taken in Kansas to mean that the title to the bed of the Kansas River is established in the State, and the decision is of such prestige within the State, that the State's assertation of title to the bed of the Arkansas River has not even been challenged.

This is a practical world filled with practical people and legal theory cannot change the practical result that Kansas

has been granted the sovereignty over, and ownership of the beds of all rivers within the State which were not expressly conveyed before statehood, whereas this same important [fol. 188] privilege is about to be by this decision denied to the State of Oklahoma.

The appellees further call to the attention of the Court the fact that two companion cases are now before the Supreme Court of Oklahoma. These cases (entitled *State of Oklahoma et al.* v. *Oldham*, No. 32629; and *State of Oklahoma et al.* v. *Aladdin Petroleum Co.*, No. 32625), were brought by the State of Oklahoma and its oil lessee, the Champlin Refining Co., against the owners of the riparian lots on the Arkansas River adjacent to that portion of the river bed which has been developed for oil under the lease held by the Champlin Refining Company. These cases involve the same river, the same general treaties, and the same oil lease, but different riparian lots and different sectors of the river bed than in the case at bar.

The trial court, in those cases, decided that it was bound by the rule of property announced by the State Supreme Court in *State* v. *Nolegs*, and rendered judgment for the State and against the riparian owners.

The State of Oklahoma earnestly feels that if this weighty issue is to be properly settled and determined by the Supreme Court of the United States, that Court should have the benefit of the holding of the State courts, as well as of the Federal courts, in these cases. For this reason, the appellees respectfully ask that this Court withhold its decision upon this petition for rehearing until a decision has been rendered by the Oklahoma Supreme Court upon the cases above described. For grounds of this request the [fol. 189] appellees respectfully cite the case of *City of Chicago* v. *Fieldcrest Dairy*, 316 U. S. 172, in which the United States Supreme Court invoked the doctrine of *Erie* v. *Tompkins*, and directed the Circuit Court of Appeals for the Seventh Circuit to withhold its opinion until the State court had acted upon a similar question.

The appellees further respectfully call the Court's attention to the statement on Page 6 of the opinion as follows:

> "On September 16, 1944, a stipulation was entered into to the effect that it should be considered that the United States had introduced evidence showing the Arkansas River to be non-navigable in fact at the

location of the river bed in controversy on all dates material in this case.

"The trial court found that the patents neither expressly included nor excluded the river bed and that the river, at all times material to the controversy, at the locations of the riparian tracts, was non-navigable in fact."

Also to the statement on Page 11 of the opinion as follows:

"Here, the trial court, *from the stipulated facts*, found that the river was non-navigable in fact."

These two statements when read together would leave the impression that the appellees stipulated that the river was non-navigable in fact. Nothing could be farther from the appellees' view of what was *actually stipulated*. The purpose of the stipulation was merely to agree that the Government's witnesses would testify that the river was non-navigable, in order to save the time and expense of lengthy testimony on an issue which the State regarded as imma-
[fol. 190] terial. The stipulation went on to say (although the opinion of the Court does not mention it) that the State objected to such testimony as immaterial and irrelevant, inasmuch as the State Supreme Court had already determined the question of navigability. The State, as a matter of fact, introduced the *Nolegs* decision as its evidence in this case, showing that the Supreme Court of Oklahoma had determined the river to be navigable.

The trial court, therefore, had before it the evidence of the State, showing the river to be navigable, and the offered evidence of the Government to the effect that the river was non-navigable.

The trial court held, correctly as we believe, that it was bound by the State's declaration of navigability, and that its own statements as to non-navigability and/or comment thereon was immaterial, since it had no jurisdiction to make such finding.

We earnestly request the Court to review the language of the opinion with reference to the stipulation so that it will clearly show that the State made no stipulation that the river was non-navigable in fact, as we earnestly desire to distinguish between an agreement that certain testimony may be introduced, and the resulting (and we think

erroneous) conclusion that such testimony, even in the face of the *Nolegs* doctrine, becomes the binding view and finding of the trial court.

Wherefore, appellees respectfully ask that they be granted a rehearing in this cause, that upon such rehearing [fol. 191] this Court decide that under the Constitutional doctrine of equality, the State law in Oklahoma shall govern the riparian rights of the riparian owners in this case, just as the State law was allowed to govern the riparian rights of similar owners in the State of Kansas; that as to this question of State law, the Federal courts are bound, under the decision of the Supreme Court of the United States in *Erie* v. *Tompkins*, 304 U. S. 64-79, as construed in *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 106, to render the same judgment which the State court would have rendered if it were deciding the case, and that, since the Oklahoma Supreme Court has declared in *State* v. *Nolegs* that the Arkansas River is navigable throughout its entire length within the State, the patentees in the case at bar are without title or ownership of the bed of the Arkansas River at the locations involved in this action.

Respectfully submitted, Mac Q. Williamson, Attorney General; J. Walker Field, Assistant Attorney General; Walter Marlin, Law and Executive Counsel for The Commissioners of the Land Office of the State of Oklahoma; Harry O. Glasser, Nathan Scarritt, E. S. Champlin, Attorneys for Champlin Refining Company.

August, 1946.

[fol. 192] CERTIFICATE

I, Mac Q. Williamson, Attorney General of Oklahoma, and of counsel for appellees herein, do hereby certify that I am familiar with the contents of the above and foregoing petition for rehearing; that I verily believe that said petition is meritorious and is not vexatious and is not filed for purposes of delay, but in order that substantial justice may be had and done.

(Signed) Mac Q. Williamson, Attorney General of the State of Oklahoma, Of Counsel of Appellees.

Oklahoma City, Oklahoma, August 10, 1946.

[File endorsement omitted.]

[fols. 193-194] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING

Fifty-fifth Day, May Term, Thursday, August 29th, A. D. 1946

Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Franklin E. Kennamer, District Judge

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

(On September 10, 1946, an order was entered staying the issuance of the mandate for sixty days from that day.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 195] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 715

ORDER ALLOWING CERTIORARI—Filed January 20, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Mac Q. Williamson. File No. 51,579. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 715. State of Oklahoma and Champlin Refining Company, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed November 25, 1946. Term No. 715 O. T. 1946.

FILE COPY

No. 713

FILED

NOV 25 1948

CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1948

STATE OF OKLAHOMA, EX REL. CHARLES NESBITT, Commissioner of Conservation,

Complainant,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari, and Brief in Support Thereof

MAC Q. WILLIAMSON,
Attorney General for the State of Oklahoma;

J. WALKER FIELD,
Assistant Attorney General, for the State of Oklahoma;

WALTER HUBER,
Counsel for the Commissioners of the Land Office of the State of Oklahoma;

HARRY O. GLASSER,
NATHAN SCARRITT,
E. S. CHAMPLIN,
Attorneys for Champlin Refining Company.

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(1) The State law governs in determining what shall be deemed a navigable water within the meaning of the local rules of property 34

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(3) When the United States divests itself of title to the shore lands along non-navigable rivers, title to the river bed may pass to the State merely by the action of the State in excluding riparian owners from ownership of the bed, provided only that the United States does not elect to retain its superior title 36

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(5) Although there is an exception to this general rule, to-wit, that the states may not invoke a rule of navigability contrary to the fact, against the United States itself or against grantees of the United States whose rights to the river beds have become vested by express grants, this exception does not apply to the case at bar because in this case the United States is not claiming title to the river bed in its sovereign capacity and it has not expressly conveyed the river bed or any riparian rights therein to any claimants in the present action 38

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SUPREME COURT OF THE UNITED STATES.

October Term, 1946.

No. .....

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioners respectfully show:

Summary Statement of Issues Involved.

This case is between the State of Oklahoma and private claimants to determine whether the bed of the Arkansas river at the location in controversy, shall belong to the whole people of the state, or whether it shall be divided among the various private owners of the lands along the shore. In a larger sense, the case involves the right of the State of Oklahoma and all other states similarly situated, to exercise the same sovereignty and control over the beds

of their rivers generally, as is enjoyed by the older states of the Union.

The State of Oklahoma claims title to the portion of the Arkansas river bed here in question by virtue of a decision of the Supreme Court of Oklahoma rendered in 1914, seven years after statehood, in the case of *State* v. *Nolegs*[1] in which the state court took judicial notice of the fact that the Arkansas river is navigable throughout the state, and that the bed of the river belongs to the State of Oklahoma.[2] It is not pretended that this river is navigable under the Federal test of actual navigability.[3] However, this Court in *Wear* v. *Kansas*, 245 U. S. 154, as affirmed in *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77, has expressly approved the general practice of the states of reserving control over the beds of their rivers by declaring them to be navigable, although in the language of the court, "they are not actually so."[4] Hence, it is entirely immaterial for the purposes of this case whether or not the Arkansas river is actually navigable at the location in controversy. The only real issue in this action is whether the state determination of navigability is the governing law of the case.

The state, in pursuance of its claim of title, has sold and delivered an oil and gas lease upon the portion of the river bed here in controversy to the Champlin Refining Company, reserving the usual royalty in favor of the state.[5] The state's lessee had drilled two producing oil wells upon the lease,[6] which lease is now estimated by the state to have a value of $500,000.00.

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1. 40 Okl. 479.
2. This decision was re-enforced by a state statute, enacted in 1919 (Title 64, Okla. Stats. 1941, Sec. 290), covering, generally, all streams of two chains or over in width.
3. The Arkansas river is actually navigable below its confluence with the Grand river in eastern Oklahoma, but such portion of the river is not involved in the present case.
4. Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77.
5. Exhibit "B" to Complaint, Record, page 20; admitted by answers, Record, pp. 23, 27, 28.
6. Record, p. 70: At the time of the trial only one well had been completed on the lease.

The title of the state is here being disputed by certain Otoe and Pawnee Indians who, prior to Oklahoma statehood, received Federal patents covering lands along the shore, adjacent to the above described river bed lease. These patentees claim that the common law, as adopted by the Territory of Oklahoma, had the effect of extending their patents to the center of the stream at the time the patents were issued.

The present action was brought by the United States on behalf of the Indians above described, to quiet their alleged title, to eject the State of Oklahoma from possession of the river bed and to cancel the above described lease. Two important features of the plaintiffs' action are, (1) the United States is not asserting title to the river bed in its sovereign capacity, having elected on the contrary to claim title for the Indian riparian owners as above stated,[7] and (2) the United States does not contend that it *expressly* conveyed the river bed to the riparian lot owners, for as the government concedes, the patents which are involved in this case do not expressly convey any portion of the river bed.[8]

The State of Oklahoma defends its title against the contentions of the riparian owners upon the following principles:

(*1*) The portion of the river bed here in controversy was part of the public domain at the time Oklahoma was admitted as a state and was never granted to the riparian owners by the United States.[9] Although the river bed had been granted by the United States to the Cherokee nation in 1828,[10] (at a time when it was not contemplated that a

7. Complaint, Record, pp. 11-13; Stipulation, Record, p. 38; Conclusions of Law, Record, p. 72.

8. Findings of Fact V, Record, p. 69.

9. Title 43, U. S. C. 931, might appear on its face to dispose of beds of non-navigable rivers, but this statute does not cover the public lands involved in this case. It is shown in the historical note following this section in U. S. C. A. to have been derived from the Act of May 18, 1796 (1 Stat. 468), and the Act of May 3, 1803 (2 Stat. 235). The first statute applied only to the territory northwest of the Ohio river, and the second statute applied only to the old Mississippi territory south of the State of Tennessee and east of the Mississippi river.

state would ever be formed in the Indian country),[11] this portion of the bed was later, in 1891, ceded back to the United States by the Cherokees with other lands[12] and in 1893 was declared by the President of the United States to be a part of the public domain, in the proclamation in which he opened for settlement the lands in northern Oklahoma commonly known as the Cherokee Outlet or Cherokee Strip.[13]

Thereafter, the United States issued the allotment patents covering lands along the south bank of the Arkansas river which are involved in the present action.[14] These patents as above stated, did not convey any portion of the river bed and did not define the riparian rights incident thereto. These patents were issued prior to November 16, 1907, on which date Oklahoma was admitted to statehood.

(*2*) This Court has held, by a long line of decisions, that where a Federal grant does not define the riparian rights which shall attach as an incident to the grant, such rights shall be determined by state law,[15] and that the same rule applies to Federal grants to members of Indian tribes.[16] Since the patents in the case at bar did not expressly cover

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10. 7 Stat. 311.

11. See treaty between United States and Cherokees, 1828, 7 Stat. 311.

12. Kappler Indian Affairs, Law and Treaties, Vol. 1, p. 490, Def. Ex. 12, Record, p. 159; introduced, Record, pp. 98, 109.

13. 28 Statutes at Large 1222. The history of the title will be set forth in detail in the attached brief. The government contended, in the courts below that the Cherokees conveyed the portion of the river bed here in controversy to the Otoe Tribe and hence, that it was not a part of the public domain. However, neither the United States District Court nor the United States Circuit Court of Appeals sustained the government on this point, and it does not appear to be one of the main issues in the case.

14. Record, pp. 114-119.

15. Barney v. Keokuk, 94 U. S. 324; St. Louis v. Myers, 113 U. S. 566; Packer v. Bird, 137 U. S. 661, 673; Hardin v. Jordan, 140 U. S. 371; Kaukauna Water Power Co. v. Green Bay and Mississippi Canal Co., 142 U. S. 254; St. Anthony Falls Water Power Plant v. Board of Water Commissioners, 168 U. S. 349; Hardin v. Shedd, 190 U. S. 508; Wear v. Kansas, 245 U. S. 154; Oklahoma v. Texas, 258 U. S. 574; Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77; United States v. Oklahoma Gas & Electric Co., 318 U. S. 206.

16. Oklahoma v. Texas, 258 U. S. 574; United States v. Oklahoma Gas & Electric Co., 318 U. S. 206; In re Heff, 197 U. S. 488; General Allotment Act of 1887, 24 Stat. at L. 388, Sec. 6.

the river bed and did not expressly grant any riparian rights, the law of the state of Oklahoma governs in determining what riparian rights, if any, shall attach to the patents in this case.

(*3*) The title to the beds of navigable streams, only, pass to a state by virtue of its admission to statehood, but the right of a state to define and determine riparian rights extends to non-navigable streams as well as to navigable streams.[17] When the United States divests itself of title to the shore lands along non-navigable rivers, the title to the river bed may pass to the state merely by the action of the state in excluding the riparian owners from ownership of the bed,[18] subject only to the superior title of the United States to the beds of such non-navigable streams if it desires to retain ownership thereof.[19]

(*4*) This Court has held many times that, in determining the riparian rights of private claimants, the state law governs in determining what rivers are navigable.[20] and that what is a navigable water under the laws of the states, may be in contra-distinction to the navigable waters of the United States.[21] This Court has further held that since a state may exclude riparian owners from ownership of the beds of non-navigable streams by "expressly denying a riparian title,"[22] the state may do the same thing by the expedient of declaring such streams to be navigable in law, even though they "are not actually so."[23] This Court has, in fact, expressly approved the general practice of the states of reserving control of their non-navigable streams by such procedure.[24]

17. Hardin v. Shedd, 190 U. S. 518; Whitaker v. McBride, 197 U. S. 511, 512.
18. Hardin v. Shedd, 190 U. S. 518.
19. United States v. Oregon, 295 U. S. 2; Oklahoma v. Texas, 258 U. S. 574; United States v. Holt State Bank, 270 U. S. 55; United States v. Utah, 283 U. S. 64.
20. Packer v. Bird, 137 U. S. 661; Hardin v. Jordan, 140 U. S. 371; Donnelly v. United States, 228 U. S. 243; Wear v. Kansas, 245 U. S. 154.
21. Donnelly v. United States, 228 U. S. 259-262.
22. Brewer-Elliott Oil & Gas Company, 260 U. S. 77.
23. Ibid.
24. Ibid.

The basis of this rule apparently is that since the original states had complete sovereignty, ownership and control, at their election, over the beds of their public waters, whether navigable or not, the new states are entitled to the same prerogative under the doctrine of equality of states.

The petitioners recognize that there is an important exception to this general rule, to-wit, that the states may not invoke a rule of navigability, contrary to the fact, against the United States itself or against grantees of the United States whose rights to the river bed have become vested by *express* grants of the United States.[25] However, this exception does not apply to the case at bar because in this case, as above stated, the United States is not claiming title to the river bed in its sovereign capacity and has not expressly conveyed the river bed or any riparian rights therein to the claimants in the present action.

(*5*) This Court applied the above stated principles in *Wear v. Kansas,* 245 U. S. 154, in which case the Supreme Court of Kansas had taken judicial notice of the navigability of the Kansas river under circumstances identical with those in the case at bar.[26] In that case, as here, the river will not sustain navigation, as has been conceded by the Supreme Court of Kansas.[27] In that case, as here, a Federal patent had been granted to an Indian, *prior to statehood.* In that case, as here, the Territorial legislature had adopted the common law which, if effective, would have extended the title of the patentee to the center of the stream at the time the patent was issued. In that case, furthermore, the Kansas territorial legislature had actually declared the Kansas river to be non-navigable. In spite of this, the Supreme Court of the United States held that the law of the State of Kansas, and not the territorial law, governed the ownership of the river bed, and upheld the state's title thereto.

25. United States v. Oregon, 295 U. S. 2; Brewer Oil and Gas Co., 260 U. S. 77; Oklahoma v. Texas, 258 U. S. 574.

26. State v. Akers, 92 Kan. 169.

27. Hurst v. Dana, 86 Kan. 947.

The Supreme Court of Kansas in 1912 took judicial notice of the navigability of the Arkansas river,[28] which is the same river as is involved in the present action (excepting that in Kansas the river is nearer its source and hence less navigable than in Oklahoma). Ever since that decision the State of Kansas has fully enjoyed the ownership and use of the bed of the Arkansas river on behalf of the whole people of that state. As an incident to such ownership the state has granted numerous oil and gas leases upon the bed of the river, which are similar to the lease involved in the case at bar, and has collected substantial royalties therefrom.[29] Because of the force of the decision of the Supreme Court of the United States in *Wear* v. *Kansas, supra,* (1917) the title of the State of Kansas to the bed of the Arkansas river has never been questioned by the United States, the riparian owners, or by anyone else.[30]

The procedure adopted by the State of Kansas to thus successfully assert title to the bed of the Arkansas river was identical with the procedure employed by the State of Oklahoma in *State* v. *Nolegs.*[31] To the people of Oklahoma it seems unthinkable that under such circumstances, the ownership of the bed of this river could be granted to one state and denied to another.

Upon trial of the present case, the United States District Court for the Northern District of Oklahoma rendered judgment for the state and held, in accordance with *Wear* v. *Kansas,*[32] that inasmuch as the Federal government had not chosen to determine the riparian rights attaching to the patents in question, and since the United States had not chosen to retain title to the river bed, the riparian rights attaching to such patents were governed by state law. The court further held that the state law was

28. Hurst v. Dana, 86 Kan. 947.

29. Findings of Fact No. XI, Record, p. 70. For evidence see Record, pp. 55-61.

30. Ibid.

31. 40 Okl. 479.

32. This case is at times cited by name only to avoid burdensome repetition of citations.

clearly expressed in *State* v. *Nolegs*,[33] to the effect that the Arkansas river was navigable and that the bed was the property of the state.[34]

The United States Circuit Court of Appeals for the Tenth Circuit reversed the judgment of the trial court on the sole ground that the common law, as adopted by the Territory of Oklahoma had the effect of extending the patents to the center of the stream at the time of their issuance.[35]

That court attempted to distinguish the case at bar from *Wear* v. *Kansas* on two grounds, (1) that in *Wear* v. *Kansas* the state court had taken judicial notice of the fact that the river was navigable, whereas in the case at bar the trial court found that the Arkansas river was non-navigable in fact (although the trial court further found that it was bound by the state rule of property that the river was navigable in law); and (2) that the state rule of navigability was not binding upon the Indian allottees in the case at bar because it was not promulgated in a case in which they were parties.

The Circuit Court of Appeals did not mention one of the principal contentions of the State of Oklahoma as set forth in the pleadings[36] and as proved by the evidence,[37] to-wit, that the undeniable and immutable fact remains that the State of Kansas possesses ownership and control of the bed of the Arkansas river, and that to deny the State of Oklahoma the same privilege, under identical circumstances, would violate the constitutional doctrine of equality of states.

It is the earnest contention of the State of Oklahoma that this obvious discrimination between two sovereign states of the Union was brought about by the failure of

33. This case is at times cited by name only to avoid burdensome repetition of citations.

34. The findings of fact and the conclusions of law of the trial court supporting such conclusion, appear at page 74 of the record.

35. Record, pp. 171, 172.

36. Record, pp. 28, 29.

37. Record, pp. 55-63, 159; Findings of Fact XI, Record, p. 70.

the Circuit Court of Appeals to follow the holdings of the Supreme Court of the United States in *Wear* v. *Kansas*[38] and *Erie Railway Company* v. *Tompkins*.[39]

The Circuit Court of Appeals said that the law of the Territory governed the disposition of riparian rights, but the Supreme Court of the United States in *Wear* v. *Kansas*, rejected an identical contention and held that the state law governed such rights.

The Circuit Court of Appeals said, in effect, that the question of navigability was to be determined anew upon the trial of each case that might arise concerning the ownership of the river bed, but the Supreme Court of the United States said, in *Wear* v. *Kansas* that the fact of navigability, "is of a kind that should be established once for all, not perpetually retried."

The Circuit Court of Appeals said that it was not bound by the rule of property promulgated by the Supreme Court of Oklahoma in *State* v. *Nolegs*[40] because the riparian owners in the case at bar were not parties to that case. To the contrary, the Supreme Court of the United States, when construing the rule of *Erie* v. *Tompkins*[41] in *Wichita Royalty Company* v. *City National Bank*,[42] held that where the question is one of state law, the Federal court *must render the same judgment which the state court would have rendered if it were deciding the case.*

Companion cases to the case at bar are now before the Supreme Court of Oklahoma, which clearly show the confusion which would result if the decision of the Circuit Court of Appeals is allowed to stand. Those cases involve the same river bed lease as appears in the present case and are identical with the present action in all respects, excepting only that they involve different riparian lots, which are owned by non-Indians. The District Court of Pawnee Coun-

38. 245 U. S. 154.
39. 304 U. S. 64.
40. 40 Okl. 479.
41. 304 U. S. 64.
42. 306 U. S. 106.

ty, Oklahoma, decided those cases in favor of the state, and made no finding that the Arkansas river is non-navigable in fact, at the location in controversy. On the contrary, the state court rejected a request by the riparian owners for such a finding, and found instead that the river was navigable under the rule of property announced by the Oklahoma Supreme Court in *State* v. *Nolegs.*[43]

The narrow grounds upon which the Circuit Court of Appeals declined to follow *Wear* v. *Kansas* therefore do not exist in the cases in the state court, and it is apparent that even the rule announced by the Circuit Court of Appeals would require a decision for the state in those cases. If the Supreme Court of Oklahoma decides these cases for the state, either on the broad grounds of its own decision in *State* v. *Nolegs,* or upon the narrow grounds contained in the opinion of the Circuit Court of Appeals, the state will retain title to the segments of the river bed involved in those cases, whereas under the decision of the Circuit Court of Appeals, the segments in the river bed involved in the present action will belong to the riparian owners. Thus the title to the bed would depend upon whether the Federal jurisdiction or the state jurisdiction were invoked, which would be the exact opposite of the result which it was the intention of *Erie* v. *Tompkins* to accomplish.

Jurisdiction.

This Court has jurisdiction to review the present action under Section 240 of the Judicial Code, U. S. C., Title 28, Section 347(a).

Federal questions are presented by the conflicting contentions of the parties with reference to the construction of:

(*1*) The constitutional doctrine of equality of states;

(*2*) The decisions of the United States Supreme Court

43. Record, Supreme Court of Oklahoma, Aladdin Petr. Corp., et al., v. State of Oklahoma, et al., No. 32625, pp. 225, 245, 246; L. D. Oldham, et al., v. State of Oklahoma, et al., No. 32629, pp. 246, 266, 267.

in *Wear* v. *Kansas*[44] and *Brewer-Elliott Oil and Gas Company* v. *United States*,[45] and the long line of decisions upon which those cases were based;

(*3*) The various treaties between the United States, and the Cherokee Nation, the Acts of Congress and Executive Orders with reference to the conveyance from the Cherokees to the Otoes and Pawnees, the Proclamation of the President of the United States opening the Cherokee Outlet for settlement, and the Federal patents to the various Indian allottees who are the real plaintiffs in this case, all of which will be detailed fully in the attached brief.

Questions Presented.

The questions presented in this case are:

(*1*) Does a state of the United States have the right to define riparian rights attaching to Federal patents issued prior to statehood, where such patents do not contain any conveyance of the river bed nor any definition of riparian rights?

(*2*) Does a state of the United States have the right to assert title to the bed of a river within its boundaries by a declaration of navigability, even though the river does not meet the Federal test of navigability-in-fact, when the United States has divested itself of title to the shores, is not asserting title to the bed, and has never conveyed the bed to anyone?

(*3*) Since the State of Kansas has been permitted to assert the rights above mentioned with reference to the Arkansas river, as the result of a decision of the United States Supreme Court, can the State of Oklahoma be constitutionally denied the same privilege as to the same river?

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44. 245 U. S. 154.
45. 260 U. S. 77.

Reasons Relied Upon for the Allowance of the Writ.

The petitioners respectfully urge that a writ of certiorari be granted for the following reasons:

(*1*) The question in this case is of profound importance not only to the states of Oklahoma and Kansas, but to all of the western states in which flow rivers of the type of the Arkansas. These rivers, though not actually navigable, carry tremendous volumes of water. They have broad beds, sometimes exceeding a mile in width, which are not adaptable to private ownership but which are most valuable to the public for many purposes including, for example, flood control, hydro-electric power, irrigation and fish and game refuges.

The Supreme Court of the United States has expressly approved the practice of the states in reserving ownership and control over the beds of such rivers by the expedient of declaring them navigable, but the decision of the Circuit Court of Appeals would nullify this wise policy. In so doing, the Circuit Court of Appeals has decided a Federal question in conflict with the decisions of this Court in *Wear* v. *Kansas*,[46] *Brewer-Elliott Oil and Gas Company* v. *United States*[47] and the long line of cases upon which these decisions were based.

(*2*) The specific portion of the river bed here in controversy is extremely valuable to the people of Oklahoma, and is the property of the state under the local law. In declining to follow the rule of *State* v. *Nolegs*, the Circuit Court of Appeals has decided an important question of local law in conflict with a rule of property of the Supreme Court of Oklahoma which has been in effect in this state for more than thirty years.

(*3*) This departure of the Circuit Court of Appeals from the settled doctrines of *Wear* v. *Kansas*, and *Erie* v. *Tompkins* would, if allowed to stand, result in the utmost confusion as to riparian titles along the Arkansas river in

46. 245 U. S. 154.
47. 260 U. S. 77.

both Oklahoma and Kansas and along all similar rivers in other states. In Oklahoma, where certain portions of the Arkansas river bed were expressly conveyed by the United States to Indian tribes prior to statehood, a simple rule of property has prevailed, to-wit, that those portions of the river bed which were thus conveyed to Indian tribes remain the property of the grantees, whereas all other portions of the river bed are the property of the state. In Kansas, where no such conveyance of the river bed to Indian tribes occurred, the state has held undisputed title to the entire bed for many years. In both states, the decision of the Circuit Court of Appeals would upset the established title of the state and would cause every riparian owner along the banks of the river to sue the state to recover title to the bed, and for an accounting for all royalties received by the state. Those riparian owners who came within the jurisdiction of a Federal court and who could obtain a finding by such court that the river was non-navigable in fact, would recover title to the portion of the bed opposite their riparian lots. On the other hand, those riparian owners whose cases remained in the state courts would doubtless be met by the state rule of navigability in law, in which event the state would retain title to the portions of the river bed involved in those cases. The confusion of titles which would thus result springs from the fact that the Circuit Court of Appeals has declined to follow the doctrine of the United States Supreme Court in *Wear* v. *Kansas* in which it said:

> "In this aspect it (the navigability of a river)[48] is a question of state law. * * * The fact is of a kind that should be established once for all, not perpetually retried."

Wherefore your petitioners respectfully ask that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to cer-

48. Language in parentheses supplied.

tify and to forward to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein and that the decree of the United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Court and your petitioners have such other and further relief in the premises as to this Court may seem just.

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J. WALKER FIELD,
Assistant Attorney General of the State of Oklahoma;

WALKER MARLIN,
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NATHAN SCARRITT,
E. S. CHAMPLIN,
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BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*.

Opinions of Courts Below.

No formal opinion was written by the District Court of the United States for the Northern District of Oklahoma. However the findings of fact and conclusions of law of that court, rendered December 21, 1944, are in opinion form. (Record, p. 65)

The opinion of the Circuit Court of Appeals for the Tenth Circuit was rendered July 29, 1946, 156 F. (2d) 769. Petition for rehearing was denied on August 29, 1946.

Jurisdiction.

The grounds on which the jurisdiction of this Court is invoked appear on page 10 of the petition.

Statement of the Case.

A statement of the case appears on pages 1 to 10 of the petition.

Specification of Errors.

(*1*) The court below erred in holding that the common law as adopted by the Territory of Oklahoma had the effect of extending the patents of the Indian allottees in this case, to the center of the Arkansas river at the time the patents were issued.

(*2*) The court erred in holding that the Oklahoma law of navigability does not govern the riparian rights of the Indian allottees in this case.

(*3*) The court erred in holding that the riparian rights of the Indian allottees in this case are governed by the finding of the trial court that the Arkansas river is non-navigable in fact.

(4) The court erred in holding that the Indian allottees for whom this suit was brought, are the owners of the south half of the Arkansas river at the location in controversy.

(5) The court erred in holding that the State of Oklahoma has no title to the above described portion of the Arkansas river bed.

(6) The court erred in reversing the judgment rendered by the United States District Court for the Northern District of Oklahoma in this case.

Summary of Argument.

A summary of the argument appears at pages 3 to 10 of the petition.

ARGUMENT.

PROPOSITION 1.

The portion of the Arkansas river bed here in controversy was part of the public domain at the time the patents involved in this action were issued and at the time Oklahoma was admitted as a state. Such portion of the bed was never granted to the riparian owners by the United States or by the State of Oklahoma.

To prove this proposition it will be necessary to trace the title of the Arkansas river bed from its first acquisition by the United States from the French Nation as a part of the territory included in the Louisiana Purchase.

In 1828, 1833 and 1835, the United States made treaties with the Cherokee Nation by which it agreed to convey to that tribe a large amount of territory covering what is now the northeastern part of Oklahoma, together with an outlet to the hunting grounds of the Great Plains, which strip covers the entire northern part of Oklahoma and is com-

monly known as the Cherokee Outlet.[1] This territory included the Arkansas river at the location in suit and was formally deeded to the Cherokee Nation in December, 1838, in pursuance of the above described treaties.[2] This conveyance was made to the Cherokees at a time when it was not contemplated that a state would be formed in the Cherokee Nation.[3]

It having become apparent that the Cherokees had been granted more land than they would require, a treaty was made in 1866 between the United States and the Cherokee Nation by which it was agreed that the United States might settle any tribe of friendly Indians upon lands within the Cherokee country, west of the ninety-sixth meridian.[4] As this meridian is the eastern boundary of the Cherokee Outlet, the effect of the treaty was that friendly tribes might be settled anywhere in the Outlet.

Pursuant to the above treaty, Congress by Act of June 5, 1872,[5] authorized the Cherokee Nation to convey to the Osage tribe that portion of the Cherokee Outlet which now comprises Osage County, Oklahoma. This act described the tract conveyed as follows:

> "Bounded on the east by the 97th Meridian, on the south and west by the north line of the Creek country and the *main channel of the Arkansas river,*[6] and on the north by the south line of the State of Kansas."

It was held in *Brewer-Elliott Oil and Gas Company* v. *United States,*[7] that this act, *by its express terms,* extended the conveyance to the center of the river and thus conveyed the north half of the river bed to the Osage tribe.

In September, 1872, the Federal Government's survey of the lands here in question was approved by the Commis-

1. 7 Stats. 311, 7 Stats. 414, and 7 Stats. 478.
2. Def. Ex. 1C, Record, p. 138; introduced, Record, p. 109.
3. See Treaty of 1828 with the Cherokees, 7 Stat. 311.
4. 14 Stats. 799.
5. 17 Stats. 228.
6. Emphasis will be ours unless otherwise noted.
7. 260 U. S. 77.

sioners of the General Land Office and was filed by them as the official government survey of such territory. Copies of the portions of this survey pertaining to the townships which include the river lots here in suit, to-wit, Township 23 North, Range 3 East, (Otoe lands) and Township 23 North, Range 4 East (Pawnee lands) were introduced in evidence[8] and photostatic copies thereof accompany the printed record. These plats show that the bed of the Arkansas river was not surveyed and was not included within any township, section or lot lines, but was meandered as in the case of all rivers in which title to the bed was reserved to the public. None of the government lots along the bank of the river included any portion of the river bed.

It is worthy of note that the Federal government never attempted to sell or convey any portion of the river bed to any Indian tribes after the filing of this survey, having apparently decided that a state would eventually be formed in the Indian territory, and that the bed of the river should be reserved to the public as in the older states.

Thereafter, in 1876, Congress set apart a portion of the Cherokee Outlet, together with a small portion of the Creek territory, as a reservation for the Pawnee tribe, which reservation is a part of the present Pawnee County of the State of Oklahoma.[9] This reservation included Township 23 North of Range 4 East, which is one of the townships in suit. It is important to note that the description of such reservation in the Act of Congress above referred to reads as follows:

> "All that tract of country *between* the Cimarron and Arkansas rivers embraced within the limits of Townships 21, 22, 23, 24 N., Range 4, E. * * *"

The use of the word "between" clearly indicates that neither the Arkansas river nor the Cimarron river was included within the reservation. Furthermore, the government survey above referred to did not include any portion of the

8. Record, p. 96, p. 109.
9. 19 Stats. 28.

river bed within Township 23 of Range 4, but on the contrary stopped the township lines at the river's edge.

On March 3, 1881, Congress authorized the Secretary of the Interior to move the Otoe and Missouria tribes from their then reservations in Kansas and Nebraska,[10] and on June 25, of that year the Secretary of the Interior issued an order setting apart a reservation of 129,113.20 acres for the Otoe and Missourias out of the Cherokee Outlet, which reservation is located in what is now Pawnee County, Oklahoma. Unlike the grant to the Osages, the Otoe reservation did not include any portion of the Arkansas river bed. On the contrary, this reservation included only that portion of the territory which lay on the river bank, as shown by the express language of the Secretary of the Interior's order. As the order is short, we quote it in full, omitting only the townships not involved in this action:

"OTOE RESERVATION.

Department of the Interior,
Washington, June 25, 1881.

Sir: Agreeably to your recommendation of the 13th instant, the following described lands in the Indian Territory, west of the 96°, west longitude, in the tract ceded to the United States by the Cherokees, for the settlement of friendly Indians, by the sixteenth article of their treaty of July 19, 1866, are hereby designated and assigned for the use and occupation of the confederated Otoe and Missouria tribes of Indians, under the provisions of the Act of Congress approved March 3, 1881, (21 Stat., p. 381) namely: • • •

• • • • • • • •

Also that portion of Township 23 North, Range 3 East, lying west of the Arkansas river, containing 14,098.84 acres.

Total acreage, 129,113.20 acres.

10. 21 Stats. 380.

The papers which accompanied your letter before noted are herewith returned.

Very respectfully,

S. J. Kirkwood, Secretary

The Commissioner of Indian Affairs."[11]

It is to be noted that this order used the words, "lying west of the Arkansas river," indicating the clear intention of the Federal government that the bed of the Arkansas river should not be included in the Otoe reservation.

It is to be further noted that the portion of the said township which was set apart for the Otoes was stated in the order to contain 14,098.84 acres. The present county surveyor of Pawnee County has carefully computed the acreage shown on the government survey, using the acreage figures as shown thereon for each lot, section and fractional section contained in the said fractional Township 23 N. of Range 3 E., and has certified that the acreage of the said fractional township, as shown on the government plat, exclusive of the river bed, is 14,099.24 acres.[12] This certificate was corroborated by a similar certificate of Roy G. Collier, civil engineer.[13]

The acreage as shown by these certificates is only 4/10 of an acre different than the acreage as shown in the Secretary's order. This difference is so slight as to be entirely negligible, particularly in consideration of the intricacy of the computation, as shown by the work sheets attached to the affidavits. The fact is evident, therefore, that the Federal government, by order of the Secretary of the Interior set aside a stated number of acres in the said township as a reservation for the Otoes, and the official government survey shows that this stated number of acres comprises only that part of the said township which lies west of the river, *exclusive of the river bed.*

11. Plf. Ex. 5, Record, p. 121; introduced, Record, pp. 89, 109.
12. Def. Ex. 9A, Record, p. 154; introduced, Record, p. 109.
13. Def. Ex. 9, Record, p. 148; introduced, Record, pp. 97, 109.

In 1883 Congress made an appropriation for the purchase from the Cherokees of this new reservation for the Otoes, Missourias, and the other Indian tribes which were settled in the Cherokee country. This Act of Congress[14] provides as follows:

> "That the sum of three hundred thousand dollars is hereby appropriated, to be paid into the Treasury of the Cherokee Nation, out of the funds due under appraisement for Cherokee lands *west of the Arkansas river,* which sum shall be expended as the acts of the Cherokee legislature direct, this amount to be immediately available; Provided, that the Cherokee Nation through its proper authorities shall execute conveyances, satisfactory to the Secretary of the Interior, to the United States, in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages now occupying said tract, *as they respectively occupy the same* before the payment of said sum of money."

It is important to note that this act uses the words "west of the Arkansas river," again clearly indicating the recognition by Congress that the lands of the Otoes and Missourias did not include the bed of the river.

It will also be noted that the statute states that the land granted to the Otoes shall be "as they respectively occupy the same." Previous to the enactment of the statute, the Secretary of the Interior had set apart the Otoe Reservation on the west bank of the river and had defined this reservation by number of acres, as above stated, showing clearly that no part of the reservation was in the bed of the Arkansas river. It is clear therefore, that at the time of the enactment of the Federal statute, the land occupied by the Otoes was the reservation as defined by the Secretary of the Interior, and that the Federal statute, by stating that the grant shall be limited to the land "now occupied" by the

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14. 22 Stats. 624.

Otoes, confirmed the intention that the grant should cover only the reservation on the west shore of the river.

Pursuant to the above described statutes and orders, the Cherokees executed formal conveyances on June 14, 1883, one of which was made to the United States in trust for the Otoes and Missourias[15] and the other to the United States in trust for the Pawnees.[16] These deeds were drawn in almost identical language, each with the other, with the exception only of the property conveyed. They both recite that they are made in pursuance of the Act of Congress of 1883 above referred to,[17] by which, in the language of the deeds, "$300,000 was appropriated 'to be paid into the Treasury of the Cherokee Nation out of funds due unto appraisement for Cherokee lands west of the Arkansas river'."

The deed to the Pawnees then recites that it conveys:

> "The following townships and fractional townships north and east of the Indian meridian, the fractional townships *being on the right bank of the Arkansas river* * * * fractional Townships 23 and 24 North, Range 4 East. * * *"

The deed to the Otoes, in similar language, recites that it conveys:

> "All those certain tracts of land lying and being in the Indian Territory embracing the following township and fractional township north and east of the Indian meridian, *viz.*, * * * fractional Township 23 N. Range 3 E. of the Indian meridian, *lying and being on the right bank of the Arkansas river.* * * *"

The Otoe deed then goes on to recite that the entire reservation covered by the deed contains, in all, 129,113.20 acres, which is exactly the same acreage as stated in the order of Secretary of the Interior above referred to as Defendant's Exhibit 5a.

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15. Plf. Ex. 7, Record, p. 129; introduced, Record, pp. 86, 87, 108, 109.
16. Plf. Ex. 6, Record, p. 122; introduced, Record, pp. 86, 108, 109.
17. 22 Stats. 624.

Both deeds refer to annexed plats marked "A."[18] Each of these plats expressly shows that the Arkansas river is excluded from the territory covered by the deed and that the township lines stop at the edge of the river.

It is apparent from the foregoing statutes, orders and conveyances that neither the Pawnee nor Otoe tribes received title to any portion of the Arkansas river bed but that the bed in its entirety remained the property of the Cherokee Nation, excepting only that portion which had been expressly conveyed to the Osages.

It is important to note that these grants were made to the above described Indian tribes as individuals and not as sovereign nations, since Congress, by the Act of March 3, 1871, (16 Stats. 566) provided "that hereafter no Indian or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." (See preface of second edition of Kappler's Indian Laws and Treaties, Vol. I.) The grants to the Otoes and Pawnees were made long after the above quoted Act of Congress, and hence, were made to these Indians as individual citizens rather than as Indian tribes, in the same manner and with the same effect as though the grants had been made to any other organization of individuals.[19]

Shortly after this the unappropriated lands in the old Oklahoma Territory were opened for settlement, and the

18. Plf. Ex. 6 and 7, Record, pp. 127, 133; introduced, Record, pp. 86, 87, 108, 109.

19. See Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 94. In that case the Court reiterated the general rule that a Federal patent covering a lot on a river bank will not include the river bed unless the state law so provides. The Court then said:

> "The peculiar origin of the title to the 'Half-breed Sac and Fox Reservation,' in the peninsula lying between the rivers Mississippi and Des Moines, did not take it out of the general rule. * * * The grant to the half-breeds was to them as persons and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or states, and then the line would have been the medium *folum aquae*, as it is now between Iowa and Illinois. * * * The grant was to them as individuals, as tenants in common, and is to be construed as any other grant or sale to individuals'."

success of the famous run of 1889 led to a determination on the part of Congress to acquire the Cherokee Outlet for settlement in like manner. To accomplish this, Congress adopted the policy of purchasing back from the various Indian tribes the territory included in the Outlet, after which the lands in the various reservations were to be allotted to the members of the respective Indian tribes in severalty, and the remainder patented to settlers.[20]

Accordingly, the United States made a treaty with the Pawnee tribe in 1892[21] by which the Pawnees ceded their reservation to the United States, and agreed that the United States should allot the land to each individual member of the tribe in accordance with the General Allotment Act of 1887.[22] This treaty describes the territory thus ceded in exactly the same language as did the previous Act of Congress which had conveyed the property from the Cherokees to the Pawnees,[23] to-wit:

> "All of that tract of country *between the Cimarron and Arkansas rivers* embraced within the limits of townships 21, 22, 23 and 24 North of Range 4 East. * * *"

In 1893 Congress made an appropriation with which to pay the Pawnee tribe for the reservation thus ceded back to the United States. This statute[24] reads in part as follows:

> "That the sum of eighty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the same to be immediately available, to pay the Pawnee tribe of Indians in Oklahoma, formerly a part of the Indian Territory, for all their right, title, claim and interest of every kind and character in

20. Mills, Oklahoma Indian Land Laws, p. 407.

21. Kappler Indian Affairs, Laws and Treaties, Vol. 1, pp. 496-498; Def. Ex. 10, Record, p. 159; introduced, Record, pp. 97, 109.

22. 24 Stats. 389.

23. 19 Stats. 28.

24. 27 Stats. 568, Sec. 12.

and to all that tract of country *between the Cimarron and Arkansas rivers* embraced within the limits of seventeen specified townships of land, ceded, conveyed, and relinquished to the United States by said Pawnee tribes of Indians, by article one of an agreement concluded on the twenty-third day of November, eighteen hundred and ninety-two between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed commissioners on the part of the United States, and said Pawnee tribe of Indians. * * *"

The use of the word "between" again indicates the recognition by Congress that the Pawnee tribe had never owned any portion of the Arkansas river bed. It is also clear from the foregoing that the Pawnees relinquished to the United States every vestige of title which they had ever owned in any and all lands which they had acquired in Oklahoma. However, such relinquishment does not affect the title to the river bed as the Pawnees never held title to the bed.

No treaty was made with the Otoe and Missouria tribes, their lands being allotted to the individual members of the tribe by authority of the General Allotment Act of 1887[25]. However, as the Otoes had never acquired the bed of the Arkansas river, it was not necessary that they should relinquish any title thereto.

On December 19, 1891, a treaty was made with the Cherokees by which they ceded to the United States all of their remaining right, title and interest in and to the Cherokee Outlet including the bed of the Arkansas river.[26] The all-inclusive nature of this cession is shown by the first article of the treaty which reads as follows:

"The Cherokee Nation by act duly passed shall cede and relinquish all its title, claim, and interests of every kind and character in and to that part of the

25. Mills, Oklahoma Indian Land Laws, p. 407; 24 Stats. 389.

26. Kappler, Indian Affairs, Laws and Treaties, Vol. 1, pp. 490-492; Def. Ex. 12, Record, p. 159; introduced, Record, pp. 98, 109.

Indian Territory bounded on the west by the State of Kansas; on the east by the ninety-sixth (96°) degree of west longitude, and on the south of the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation, created or defined by Executive Order dated August 10, 1869. The tract of land embraced within the above boundaries containing eight million, one hundred and forty-four thousand, six hundred and eighty-two and ninety-one one hundredths (8,144,682.91) acres more or less."

The above description constitutes the Cherokee Outlet and includes the Arkansas river at the location in suit.

In 1893, Congress approved the above described treaty and made an appropriation to pay the Cherokees for the territory thus ceded.[27] This Act of Congress reads in part as follows:

"That the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars payable as hereinafter provided is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the Secretary of the Interior is hereby authorized and directed to contract to pay eight million, three hundred thousand dollars, or so much thereof as may be necessary in addition, to pay the Cherokee Nation of Indians for all the right, title and interest and claims which the said nation of Indians may have in and to certain lands described and specified in an agreement concluded between Davis H. Jerome, Alfred M. Wilson and Warren G. Sayre, duly appointed commissioners on the part of the Cherokee Nation of Indians in the Indian Territory, on the nineteenth day of December, eighteen hundred and ninety-one, bounded on the west by the one-hundredth degree of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth degree of the west longitude, and on the south by the Creek Nation, the Territory of Okla-

27. 27 Stats. 557, Sec. 10.

homa and the Cheyenne and Arapahoe Reservation, created or defined by Executive order dated August tenth, eighteen hundred and sixty-nine; * * *"

The comprehensive terms of the treaty and the Act of Congress which ratified it, leave no doubt that the Cherokees relinquished to the United States all interest of every kind and character, which they may have had in the territory contained in the Cherokee Outlet. As noted above, the Cherokees had retained title to the bed of the Arkansas river throughout its entire course in the Cherokee Outlet, excepting only the portion expressly conveyed to the Osage tribe. It is clear, therefore, that by the terms of the cession by the Cherokees above noted the entire bed of the Arkansas river of the Cherokee Outlet, excepting the portion conveyed to the Osage tribe, became the property of the United States as part of the public domain.

This was expressly confirmed by the Presidental proclamation of August 18, 1893,* by which the Cherokee Outlet was opened for settlement.

The Proclamation first recites that the Cherokee Nation had previously:

"Ceded, conveyed, transferred, relinquished and surrendered all of its title, claim and interest of every kind and character * * *"

in and to the Cherokee Outlet. The Proclamation then declares that all of the lands thus acquired from the Cherokees and Pawnees (together with the other lands making up the Cherokee Outlet) would be open for settlement, saving and excepting only the lands in the Osage and Otoe reservation.

The pertinent parts of the Proclamation are quoted as follows:

"Now, therefore, I, GROVER CLEVELAND, President of the United States, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by other laws of the United States, and by said several

*28 Stats. 1222.

agreements, do hereby declare and make known that *all the lands acquired from the Cherokee Nation of Indians,* the Tonkawa tribe of Indians, *and the Pawnee tribe of Indians,* by the three several agreements aforesaid will at the hour of twelve o'clock noon (Central Standard Time) on Saturday the sixteenth day of the month of September, A. D., eighteen hundred and ninety-three, and not before, be opened to settlement under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, the laws of the United States applicable thereto and the conditions prescribed by this Proclamation, *saving and excepting* lands described and identified as follows, to-wit: The lands set apart for the Osage and Kansas Indians, being a tract of country bounded on the north by the State of Kansas, on the east by the ninety-sixth degree of west longitude, on the south and west by the Creek country and *the main channel of the Arkansas River;* the lands set apart for the confederated Otoe and Missouria tribes of Indians, described as follows, to-wit: Township Twenty-two North, Range One East; Township Twenty-three North, Range One East; Township Twenty-two North, Range Two East; Township Twenty-three North, Range Two East; Township Twenty-two North, Range Three East; and that portion of Township Twenty-three North, Range Three East, *lying west of the Arkansas river;* * * *" (and other lands not involved in this case).

It is highly significant that the President took pains in his proclamation to state that the Osage reservation was bounded "by the main channel of the Arkansas river," and to further state that, on the contrary, the Otoe reservation was comprised of lands *"lying west of the Arkansas river."*

On this account, it is clear that the south half of the Arkansas river bed, adjoining the Otoe reservation, was

declared to be a part of the public domain, because in the proclamation the Otoe reservation was declared to be confined to lands "lying west of the Arkansas river." It is equally clear that the north half of the Arkansas river bed within the Osage reservation was declared not to be a part of the public domain, because, in the proclamation, the Osage reservation was declared to extend to "the main channel of the Arkansas river."

After the Cherokee Outlet had been opened for settlement, the Federal government proceeded to distribute the lands in the Pawnee and Otoe reservations to the members of those tribes in severalty, under authority of the General Allotment Act of 1887.[28]

Accordingly, the government issued the trust patents which are involved in the case at bar as follows:

PAWNEES.

On October 9, 1893, to William Bayhylle, covering Lot 6, of Section 17, Township 23 North, Range 4 East (together with other lands);[29]

On October 9, 1893, to Horace Field, covering Lots 1, 2 and 3 of Section 19, Township 23 North, Range 4 East (together with other lands);[30]

OTOES.

On November 24, 1906, to Ethel Lewis Barnes, covering Lot 5, of Section 24, Township 23 North, Range 3 East (together with other lands);[31]

On June 10, 1907, to Anna Robedeaux, covering Lot 6 of Section 24, Township 23 North, Range 3 East (together with other lands).[32]

It is significant, that none of these patents conveyed

28. Mills, Oklahoma Indian Land Laws, p. 407; 24 Stats. 389.
29. Plf. Ex. A, Record, p. 114; introduced, Record, pp. 85, 108, 109.
30. Plf. Ex. 2, Record, p. 116; introduced, Record, pp. 85, 108, 109.
31. Plf. Ex. 3, Record, p. 118; introduced, Record, pp. 85, 108, 109.
32. Plf. Ex. 4, Record, p. 119; introduced, Record, pp. 85, 108, 109.

any portion of the river bed. All of the patents described the lands by lot numbers, and a reference to the official government survey[33] shows that the said lots were confined to the bank of the river and did not cover or include any portion of the bed.

The State of Oklahoma therefore is not seeking in this action to take the title of the river bed away from the riparian owners, inasmuch as the riparian owners have never received any title to the bed. The state has merely declined to extend the titles of the riparian owners to center of the river.

PROPOSITION 2.

Since the Federal patents in the case at bar did not expressly convey the river bed and did not expressly grant any riparian rights, the law of the State of Oklahoma governs in determining whether or not the title of the riparian owners extends to the center of the Arkansas river, for

(1) *The State law determines the extent of the riparian rights, which attach as an incident to Federal patents in all cases in which the patent does not define said rights.*

This rule has been upheld in a long line of decisions of the Supreme Court of the United States, from which we quote:

Brewer-Elliott Oil and Gas Company v. *United States*, 260 U. S. 89:

> "In government patents containing no words showing purpose to define riparian rights the intention to abide the state law is inferred."

Hardin v. *Jordan*, 140 U. S. 402:

> "Beyond all dispute, the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of

33. Def. Ex. 7 and 8; introduced, Record, pp. 96, 109 (Plats accompany Record.)

local law. For a determination of that question the statutes of the state and the decisions of its highest court furnish the best and the final authority."

Kaukauna Water Power Co. v. *Green Bay & Miss. Canal Co.*, 142 U. S. 271:

"It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. * * * With respect to such rights we have held that the law of the state as declared by its Supreme Court, is controlling as a rule of property."

Shively v. *Bowlby*, 152 U. S. 57:

"By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, *the law of Oregon governs the case.*"

St. Anthony Falls Water Power Company v. *Board of Water Commissioners*, 168 U. S. 366:

"The jurisdiction of the state over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court. The extent of the plaintiff's riparian right of property was therefore the subject of adjudication by the state court, and the rule has been definitely stated by that court in its judgment, which is now under review."

(2) *The above stated rule applies to non-navigable streams as well as to navigable streams.*

Hardin v. *Shedd*, 190 U. S. 519:

"When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. Nevertheless, it has become established almost without argument *that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies.*"

(3) *The same rule applies to Federal patents to Indians and Indian tribes.*

Oklahoma v. *Texas*, 258 U. S. 594:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies. *Where it is disposing of tribal land of Indians under its guardianship, the same rules apply.*"

The above language was quoted with approval in *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77.

The Court has affirmed this rule in the very recent case of *United States* v. *Oklahoma Gas & Electric Co.*, 318 U. S. 209-210, in which the Court held that the rights of the public to a highway easement on the lands of Indian allottees adjoining a state highway are to be determined by the laws of Oklahoma, and said:

> "It is well settled that a conveyance by the United States of land which it owns beneficially, or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies."

Supporting this conclusion the court said further at p. 211:

> "The interpretation suggested by the government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State, and then only by permission of the Secretary, subject to compliance with 'such requirements as he may deem necessary.'
>
> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear."

These words are significantly applicable to the case at bar, for in the present case the State of Oklahoma is subjecting the Indians "only to the same rule of law as are others in the State." Furthermore, the shore of the Arkansas river is "spotted with restricted lands held in trust for Indian allottees" and "complication and confusion would follow from applying to * * * such lands rules differing from those which obtain as to lands of non-Indians."

The rule announced in the above quoted case finds support in the Federal statutes. The General Allotment Act of 1887, under which the Pawnee and Otoe lands involved in the case at bar were distributed, reads in part as follows:

> "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or territory in which they may reside." (24 Stat. at L. 389, Section 6.)

The Supreme Court in *Re Heff*, 197 U. S. 503, declared that under such act the Indians became subject to the State laws immediately upon issuance of the trust patent and that the application of the State laws does not have to wait until the issuance of the second patent. The Court said

> "So far as his political status is concerned, the allottee is declared to be a citizen—not that he will be a citizen after twenty-five years have passed and a second patent shall have been issued."

PROPOSITION 3.

The adoption by the Supreme Court of Oklahoma of the rule of property that the Arkansas river is navigable and that its bed belongs to the State[34] had the effect of excluding the riparian owners from ownership of the bed and thereby appropriating title to the State, for,

(1) *The State law governs in determining what shall be deemed a navigable water within the meaning of the local rules of property.*

Donnelly v. *United States*, 228 U. S. 262:

> "But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several States."

34. State v. Nolegs, 40 Okl. 479.

Hardin v. Jordan, 140 U. S. 382:

"This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each state *to what waters* and to what extent this prerogative of the state over the lands under water shall be exercised."

Packer v. *Bird,* 137 U. S. 669:

"* * * In this case *we accept the view of the Supreme Court of California* in its opinion as expressing the law of that State, '*that the Sacramento river being navigable in fact,* the title of the plaintiff extends no farther than the edge of the stream'."

(2) *The State rule of navigability may be opposite to the Federal rule.*

Donnelly v. *United States,* 228 U. S. 262:

"The question of the navigability in fact of nontidal streams is sometimes a doubtful one. It has been held in effect that what are navigable waters of the United States, within the meaning of the Act of Congress, *in contradistinction to the navigable waters of the states,* depends upon whether the stream in its ordinary condition affords a channel for useful commerce."

(3) ***When the United States divests itself of title to the shore lands along non-navigable rivers, title to the river bed may pass to the State merely by the action of the State in excluding riparian owners from ownership of the bed, provided only that the United States does not elect to retain its superior title.***

Hardin v. *Shedd*, 190 U. S. 519, 520:

"When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. *Nevertheless, it has become established almost without argument that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies.* In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned. (Citing cases.)"

* * * * * * * *

"The law of Illinois has been settled since *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, and it now is clear, by the decision in this case and later that conveyances of the upland do not carry adjoining land below the water line. (Citing cases.) Following these decisions, we must hold that the title set up by the plaintiffs in error, Hardin, fails."

Thus Hardin, who claimed under United States patent, was held to have no title to the bed, and Shedd was awarded title as grantee of the State of Illinois.

In its opinion in the case of *Hardin* v. *Jordan*, 140 U. S. 393, referred to in the above quotation, this Court

recognized that the original states had appropriated title to the beds of their public waters, regardless of navigability. The Court said:

> "These ordinances seem to have been the foundation of a local common law in Massachusetts (including Maine) which has led to a course of decisions with regard to the title of lakes and ponds at variance with the common law, and which have been followed in New Hampshire and some other states. It is there held that the land under water in such lakes and ponds belongs to the state, and not to the riparian owners; and that when land is conveyed bounding upon a natural lake or pond, the grant extends only to the water's edge."

It is apparent that under the doctrine of equality of states, the new states have the same right to appropriate the beds of their public waters as did the original states.

(4) *Since a state may exclude riparian owners from title to the beds of non-navigable streams by expressly denying a riparian title, the state may do the same thing by the expedient of declaring such streams to be navigable in law, thereby appropriating title to the beds.*

Brewer-Elliott Oil and Gas Company v. *United States,* 260 U. S. 77:

> "Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river *granted* and vesting before statehood, depends for its validity on non-navigability of the stream in fact.
>
> "In *Wear* v. *Kansas,* 245 U. S. 154, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood,

to land bordering on the Kansas river, without restriction, reservation, or expansion. The state tribunals took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on the navigable stream did not convey the bed of the river. *The United States, by its unrestricted patent, was properly taken to have assented to its construction according to local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a non-navigable stream, was immaterial. In either view the result there would have been the same.*" (Italics ours.)

(5) *Although there is an exception to this general rule, to-wit, that the states may not invoke a rule of navigability contrary to the fact, against the United States itself or against grantees of the United States whose rights to the river beds have become vested by express grants, this exception does not apply to the case at bar because in this case the United States is not claiming title to the river bed in its sovereign capacity* and it has not expressly conveyed the river bed or any riparian rights therein to any claimants in the present action.*

Examples of this exception to the general rule are found in the following cases.

In *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77, this Court awarded the north half of the Arkansas river to the Osage tribe because the United States had *expressly* conveyed such portion of the river bed to the Osages prior to Oklahoma Statehood. The Court said at page 87:

> "If the Arkansas river is not navigable, then the title of the Osages as granted certainly included the bed of the river as far as the main channel *because the*

*Complaint, Record, pp. 11-13; Stipulation, Record, p. 38; Conclusions of Law, Record, p. 72.

words of the grant expressly carry the title to that line." (Italics ours.)

The Court applied the Federal rule of navigability—in fact in that case because it was construing an *express* grant of the river bed. However, there is no express grant of the river bed involved in the case at bar, nor is there any implication whatsoever of federal governmental intent to convey more land than was actually described in the various conveyances of the shore lands. Hence, under the long line of decisions quoted under Proposition 1 of this brief, the state law of navigability, and not the Federal law, governs the riparian rights of the Indian allottees in the present case. The Court recognized the general rule by stating later in the opinion at page 88:

> "It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the Public Land Laws may be determined according to local rules."
>
> • • • • • • • •
>
> "In government patents containing no words showing purpose to define riparian rights the intention to abide the state law is inferred."

And then quoted from *Hardin* v. *Jordan*, 140 U. S. 384:

> "In our judgment, the grants of the government for lands, bounded on streams and other waters without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie."

In *United States* v. *Oregon*, 295 U. S. 6, the Court held, that a state could not invoke its rule of navigability contrary to the fact so as to deprive the United States (in its sovereign capacity) of its superior title. The Court, however, recognized that the state law is supreme in defining the riparian titles of private claimants for it said later in the opinion in that case at page 28:

"The construction of grants by the United States is a Federal, not a state question (citing cases), and involves the consideration of state questions only in so far *as it may be determined as a matter of Federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances* (citing cases). In construing a conveyance by the United States of land within a state, *the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.*" (Italics ours.)

The state law regarding the riparian rights which attach to Federal patents, therefore becomes the Federal law by assent of the United States.

In *Oklahoma* v. *Texas,* 258 U. S. 574, this Court declined to follow the Oklahoma rule of navigability contrary to the fact, because in that case the United States had made an *express* grant of the north half of the Red river bed to Indian tribes prior to statehood, and had retained title (in its sovereign capacity) to the south half of the river bed. However, this Court again recognized the general rule that state laws govern the riparian rights of private claimants who have received no express grant to the river bed, in the following language found at page 594, which we repeat for emphasis:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance

should be construed and given effect in this particular according to the law of the state in which the land lies. *Where it is disposing of tribal land of Indians under its guardianship, the same rules apply.*" (Italics ours.)

PROPOSITION 4.

The Oklahoma rule of property with reference to the bed of the Arkansas river is clear and unequivocable.

The Oklahoma Supreme Court said in *State* v. *Nolegs*, 40 Okl. 479:

> "The above cases of *Dana* v. *Hurst, supra,* and *United States* v. *Mackey, supra,* both being exhaustive and well-considered opinions, the same are approved by this Court, and we hold that the Arkansas River is a navigable stream in its entire course through the State of Oklahoma, and that the title of the bed thereof, to the high-water mark, is in the state. * * *"

The State of Oklahoma has reinforced the decision in *State* v. *Nolegs* by a statute, Title 64, O. S. 1941, Section 290, which reads as follows:

> "The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared the property of the State of Oklahoma." (Laws 1919, Chapter 206, page 293, Section 1.)

The Supreme Court of Oklahoma has given effect to this statute in two recent cases, *City of Tulsa* v. *Commissioners of Land Office*, 101 P. (2d) 246, and *City of Tulsa* v. *Peacock*, 74 P. (2d) 359. Both of these cases involved the title of the Arkansas river bed, and in both cases the Supreme Court of Oklahoma assumed that the title to the river bed belonged to the State of Oklahoma.

PROPOSITION 5.

This Court applied the above stated principles in *Wear* v. *Kansas*, 245 U. S. 154, and in that case upheld the title of the State of Kansas to the bed of the Kansas river under circumstances identical with those in the case at bar. Under the authority of the rule of that case, the State of Kansas has also successfully asserted title to the bed of the Arkansas river, the same river which the State of Oklahoma is claiming in the present action.

The case of *Wear* v. *Kansas* concerned the title to the bed of the Kansas river which is a smaller river than the Arkansas and is admittedly non-navigable in fact.[35]

The State of Kansas had passed a statute regulating the sale of sand from the beds of the navigable rivers of the state and providing for the payment to the state of royalties for all sand thus sold. The action in question was brought by the state against the State Treasurer and certain riparian owners to test the constitutionality of the statute. The riparian owners claimed that the Kansas river was not navigable in fact and that they, the riparian owners, owned the bed and that the State of Kansas had no title to the bed or to the royalties therefrom.

The state court refused to hear evidence, took judicial notice of the navigability of the stream, and held that the state owned the bed to the exclusion of the riparian proprietors for the reason, in the language of the court:

> "That Kansas entered the Union upon an equal footing with the other states; that upon her admission into the Union absolute property in and dominion and sovereignty over the soils under the navigable *and*

35. See Hurst v. Dana, 86 Kan. 947, in which the Kansas Supreme Court said:

> "For a generation or more land transportation has so far superseded the use of water craft in this region that even the Missouri, a stream known to be navigable in fact and in law, has ceased to float upon its waters along the boundary of this state any appreciable commerce of the country, *and the Kansas, which we have judicially noticed as navigable* (Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330), *floats none at all.*"

public streams within its limits passed to the state, in trust for all the people, subject to the superior rights of the Federal government with respect to navigation."[36]

The Supreme Court of the United States in *Wear* v. *Kansas, supra,* affirmed the state court in all respects.

In its opinion the Supreme Court first considered the contention that the river was non-navigable under the common law (which had been adopted by the territorial legislature) and in the following language expressly denied that the patents carried to the center of the stream under such theory:

> "The argument of the plaintiffs in error does not need a lengthy response or a statement of all the answers that might be made to it. *It was said that the territorial statute gave to the patent of the United States the effect of a great ad filum aquae. But this attributes too detailed and precise an effect to a general provision of law."* (Italics ours.)

The court went on to say that since the Supreme Court of Kansas had, after statehood, renounced the English test of navigability, the state rule is the governing law and no riparian rights could have been acquired under the territorial law in excess of those later granted by state law. The court said:

> "We should be slow to believe that a state beginning its organized life with an express adoption of the common law of England stood any differently from one where the common law was assumed to prevail because the citizens were of English descent. Therefore, when the Supreme Court of Kansas regards the principle of the common law to be that the fact of navigability, not the specific test of navigability convenient for England, is what excludes riparian ownership of river beds, it is

36. The case in the state court was entitled State v. Akers, 92 Kan. 169.

impossible for us to say that the territorial statute even purports to give greater rights."

The riparian owners then contended that if navigability in fact were to be considered the test in Kansas, then the riparian owners were entitled to a jury trial, so as to determine by the evidence whether the Kansas river was navigable in fact.

The Supreme Court also overruled this contention and stated that even though navigability in fact be the test, the Supreme Court of Kansas was entitled to take judicial notice of the navigability of the river. The following portion of the opinion, written in the expressive language of Justice HOLMES, seems to contain the gist of the decision:

> "Then it was said, if navigability in fact is the test, the plaintiffs in error were entitled to go to a jury on that fact as it was in 1860, the date of the original grant, and the Supreme Court of the state was not entitled to take judicial notice that the river was navigable at Topeka. But there is no constitutional right to trial by jury in such a case, and if a state court takes upon itself to know without evidence whether the principal river of the state is navigable at the capital of the state, we certainly cannot pronounce it error. *In this aspect it is a question of state law.* (Citing cases.) *The fact is of a kind that should be established once for all, not perpetually re-tried.*" (Italics ours.)

The similarity between the above case and the present case is marked. There, the riparian owner derived title from an Indian patent issued prior to statehood. Here, the riparian owners have also derived title from Indian patents, which were also issued prior to statehood. There the common law was in effect in Kansas territory[37] the same as in the Territory of Oklahoma. There, as here, the river would not sustain actual navigation[38] although in that case

37. So held by Supreme Court of Kansas in State v. Akers, 92 Kan. 169.
38. Hurst v. Dana, 86 Kan. 947.

the additional circumstance was present, that in Kansas the Territorial legislature had actually declared the river to be non-navigable.[39] There the State of Kansas was claiming that in spite of such territorial law, the state had the sovereign right to declare the river to be navigable and thus exclude the riparian owners from title to the bed. Here, the State of Oklahoma is making the same claim. There the State of Kansas was claiming right to the sand in the river bed, and here the State of Oklahoma is making a like claim as to oil. There, the Supreme Court of Kansas established the title of the state to the river bed by taking judicial notice of the fact that the river is navigable. Here, the State of Oklahoma has established title to the river bed by the same procedure.

The decision in *Wear* v. *Kansas* was expressly affirmed in *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77, in which the Court said at page 89:

> "In *Wear* v. *Kansas*, 245 U. S. 154, 72 L. ed. 214, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood, to land bordering on the Kansas river, without restriction, reservation, or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on the navigable stream did not convey the bed of the river. The United States, by its unrestricted patent, was properly taken to have assented to its construction according to local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a non-navigable stream, was immaterial. In either view the result there would have been the same."

By the same process, the State of Kansas has also asserted title to the bed of the Arkansas river in *Hurst* v.

39. See opinion in Wear v. Kansas, 245 U. S. 154.

Dana, 86 Kan. 947, and because of the force of the decision of the Supreme Court of the United States in *Wear* v. *Kansas, supra*, the title of the state to the bed of the Arkansas river has never since been questioned.

The Oklahoma rule of property expressed in *State* v. *Nolegs*, 40 Okl. 479, is identical with that by which the State of Kansas acquired title to the same river, and was promulgated only two years after the Kansas decision. The Oklahoma Supreme Court, in fact, based its decision in *State* v. *Nolegs* upon the decision of the Kansas court in *Hurst* v. *Dana*.

Since the procedure adopted by the State of Kansas to successfully assert title to the Arkansas river was based upon Constitutional principles approved by this Court, we most earnestly plead that to deny the State of Oklahoma the ownership of the bed of the same river under identical procedure and circumstances, would violate the constitutional doctrine of equality of states, and would be so inequitable as to offend every principle of natural justice.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1946

No. 715

STATE OF OKLAHOMA and
CHAMPLIN REFINING COMPANY,
Petitioners,
VERSUS
UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE RESPONSE TO BRIEF FOR THE UNITED STATES AND RESPONSE TO BRIEF OF THE UNITED STATES

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January, 1947

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October Term, 1946

No. 715

STATE OF OKLAHOMA and
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Petitioners,

VERSUS

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE RESPONSE TO BRIEF FOR THE UNITED STATES

The Petitioners assert that the Brief of the United States in opposition to the Petition for Writ of Certiorari fails to give proper analysis to the decision of the Oklahoma Supreme Court in *Vickery* v. *Yohola Sand and Gravel Co.*, 158 Okla. 120, 12 Pac.(2d) 882, while attempting to invoke that decision as authority for the statement (Brief, Page 14) that:

> "The *Nolegs* decision has not been regarded as sound since this Court rejected it, in 1922, * * *"

and that:

> "The Supreme Court of Oklahoma acknowledged as much in 1932" (Brief, Page 14).

That inasmuch as petitioners did not cite nor discuss the *Vickery case, supra,* in their brief in support of the Petition for Writ of Certiorari and since a misinterpretation of that decision is indulged by counsel for the United States in their opposition brief, petitioners respectfully ask that they be permitted to file the attached brief for response to the Brief of the United States so that the respective positions of the parties in this important litigation shall be clearly before the Court.

WHEREFORE, the petitioners respectfully pray that the order of the Court be entered granting petitioners the right to file brief hereto attached.

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Supreme Court of the United States

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No. 715

STATE OF OKLAHOMA and
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Petitioners,

VERSUS

UNITED STATES OF AMERICA.

RESPONSE TO BRIEF OF THE UNITED STATES

I.

The Oklahoma Supreme Court in *Vickery* v. *Yohola Sand & Gravel Co.*, 158 Okla. 120, expressly reaffirmed the *Nolegs* decision by the use of the following language which appears at Page 122 of 158 Oklahoma:

> "It will be observed that the general rule announced in the Nolegs case to the effect that the ownership of the navigable waters and the soil under them within the present boundaries of the State of Oklahoma is in the State, as announced by the District Court in the Brewer-Elliott case, supra, that 'a State takes title

to the bed of navigable streams in its borders, and, subject to the paramount authority of Congress to control navigation in the regulation of interstate and foreign commerce, may appropriate and dispose of minerals found in the beds of such streams, *has never been repudiated or disputed* in any of the cases cited, except perhaps to say that Congress had the power before Statehood to convey by grant any of such lands, whenever it became necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the territory." (Emphasis will be ours throughout, unless otherwise noted.)

The respondent has, in our opinion, misconstrued the language which appears on Page 121 of the opinion in the *Vickery case, supra*, in which Justice Riley, speaking for the Court, said:

> "* * * the Federal courts refused to follow the *Nolegs case;*"

which statement is followed by the dictum:

> "This is undoubtedly true as to the holding that the court takes judicial notice that the Arkansas River is navigable through its course in Oklahoma."

The respondent failed to note that the Court then shows that each of the Federal cases referred to involved an *express grant* of a portion of the bed to certain Indian Tribes and that the Court concludes this phase of its opinion with the paragraph quoted above in which it is clearly stated that the *Nolegs* decision has never been repudiated, but that it simply does not apply to the portions

of the river *bed* which the Federal Government *expressly granted* to Indians prior to Statehood. The Court merely meant therefore that the Oklahoma rule of navigability does not cover the *entire length* of the river within the State, because the rule is subject to the prior rights of Federal grantees who received *express* grants covering portions of the river bed.

In addition to being dictum, the language referred to by the respondent represented the view of the learned Justice who wrote the opinion as to the effect of the Federal decisions upon the Oklahoma rule of navigability. As those cases involve the construction of Federal grants, the only court which can give an authoritative appraisal of the effect of such cases on the Oklahoma rule of navigability is the Supreme Court of the United States, and it is for this Court to say whether the appraisal made in the above cited dictum is correct or incorrect.

The respondent can gain little comfort from the decision itself, for the Oklahoma Supreme Court in the *Vickery case, supra*, held that the State of Oklahoma owned the bed of the Arkansas River at the location there in controversy. However, the portion of the river which was involved in that case was admittedly navigable in fact and the decision is therefore not applicable to the question here. By the same token, the remarks of Justice Riley with reference to the portion of the stream which does not meet the Federal test of navigability was not necessary to the decision

and hence represented only a personal opinion, and is purest dictum.

It may be stated further that the *Nolegs* decision is an issue, in the cases recently argued and submitted and now awaiting decision in the Oklahoma Supreme Court, which pending cases involve the same river bed in controversy in the case at bar. Petitioners submit that the Oklahoma Supreme Court should be accorded the privilege of stating in those cases it position upon the question of State law involved in the *Nolegs* decision, but we earnestly request that the Supreme Court of the United States make an authoritative declaration in the present action as to the Federal law governing all of the pending cases.

II.

The respondent's statement that the United States Supreme Court has "rejected" the *Nolegs* decision in *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U.S. 77, brings into sharp relief the extent to which the respondent is asking this Court to go in encroaching upon privileges which have heretofore been reserved to the states.

This Court did not "reject" the *Nolegs* decision in *Brewer-Elliott Oil and Gas Company* v. *United States*, *supra*, but merely declined to apply it in a case where the Federal government had *expressly granted* a portion of the *river bed* to the Osage Indian Tribe prior to Statehood.

This Court was careful to explain in the *Brewer-Elliott* opinion, *supra*, that a state has the right to exclude riparian owners from ownership of the beds of streams by declaring them to be navigable even if they are "not actually so," excepting only in cases where the riparian owners of the bed had received vested rights prior to Statehood, as by express grant from the Federal government.

The Circuit Court of Appeals for the Eighth Circuit, in its decision in *Brewer-Elliott Oil and Gas Company* v. *United States*, 270 Fed. 100, recognized that the "established rule" (Page 103) was that state laws govern the extent of riparian rights which attach to Federal patents, but went on to state that there is an "exception" (Page 104) to this established rule, to-wit: that a state cannot enforce a rule of navigability contrary to the fact against an express grantee of the Federal government.

The Oklahoma Supreme Court did not therefore mean that the *Nolegs case* is no longer the law in Oklahoma. The opinion merely holds that the Oklahoma rule of navigability of the river is subject to the prior rights of *express* Federal grantees.

Subject to that well-recognized exception, the established law of Oklahoma, beyond question, is that the Arkansas River is navigable for the purpose of defining the riparian titles of private owners of the shore lands. This is shown (1) by the *Nolegs* decision, *supra*, itself, which has never been reversed or modified; (2) by the fact

that the *Nolegs* decision, *supra*, has been reinforced by a State statute (Okla. Stat. 1941, Title 64, Section 290); and (3) by the fact that the Supreme Court of Oklahoma has assumed, in two recent cases, that the title to the Arkansas River is in the State of Oklahoma [*City of Tulsa* v. *Commissioners of the Land Office*, 101 Pac.(2d) 246; *City of Tulsa* v. *Peacock*, 74 Pac.(2d) 359]. Moreover, the Commissioners of the Land Office of the State of Oklahoma, complying with the State's policy expressed in the *Nolegs case*, *supra*, and the statute above referred to, have asserted title to the bed of the Arkansas River at the location here in controversy and have leased the same for development of oil and gas for the benefit of the people of the State of Oklahoma.

Furthermore, the Supreme Court of Oklahoma, in declaring the river to be navigable, had the same circumstances in favor of its decision, which the Supreme Court of the United States held to be "in favor" of the decision of the Kansas Supreme Court in *Wear* v. *Kansas*, 245 U.S. 154, to-wit: That the river was meandered in the original surveys;[1] that the Arkansas River had previously been held to be navigable both in Oklahoma[2] and Kansas.[3]

1. Only navigable streams are authorized by the Federal Statutes to be meandered. Title 43 U.S.C.A. Sec. 751.
2. *United States* v. *Mackey*, 214 Fed. 137.
3. *Dana* v. *Hurst*, 86 Kan. 947. This case was later followed by the Federal Courts in Kansas in *Jackson-Walker Coal & Material Company* v. *Hodges*, 283 Fed. 457 and *Shore* v. *Shell Petroleum Corporation*, 55 Fed.(2d) 696, affirmed by Circuit Court of Appeals, 10th Circuit, 60 Fed.(2d) 1.

and that the later legislation of the State supported the decision.[4]

The same Circuit Court, in fact, referred to its *Brewer-Elliott* opinion as stating an exception to the established rule in *United States* v. *Holt State Bank*, 294 Fed. 165 (affirmed by this Court in 270 U.S. 55). The Circuit Court said:

> "* * * (4) moreover, since the settled law has become that the rights and interests of riparian owners on the shores of lakes and rivers to the lands under the waters upon which they border are determinable by the law of the state in which the lands lie, and since such rights and interests are often conditioned by the navigability of such waters, it logically follows, and has long since become the law of the land, *with some exceptions not material in the consideration of this case* [*Brewer-Elliott Oil and Gas Co.* v. *U.S.* (C.C.A.) 270 Fed. 100, 107, 109], that in the determination of the rights of riparian owners to the lands under the water upon which their lands border, *what shall be deemed a navigable water must be determined by the law of the state in which the riparian lands lie.*"

The respondent rests its entire case largely upon another decision which involved the exception to the established rule, to-wit: *Oklahoma* v. *Texas*, 258 U.S. 574.

In that case the Federal government, prior to Statehood, had *expressly conveyed* to the Kiowa, Comanche and Apache Tribes of Indians the north half of the Red River (258 U.S. at Page 592) and the United States chose to retain and assert title to the remaining or south half of the river (258 U.S. at Page 583).

4. Okla. Stats. 1941, Title 64, Sec. 290.

Thus the rights of the Indians had vested in the north half of the river bed by an express grant prior to statehood, and this Court applied the exception to the "established rule" for that reason. Since the construction of an express Federal grant was involved in that case, this Court held that the Oklahoma rule of navigability contrary to the fact could not be applied, and that for the purpose of that case, the river was non-navigable. Hence the Court, in determining the riparian rights attaching to the express Federal grants in that case, applied the Oklahoma law with reference to non-navigable streams, which happened to be the common law.

It is worthy of note, however, that this Court limited the title of the Indians to that part of the river to which they had received an express grant (258 U.S. at Page 592) and declined to extend their ownership of the river bed beyond the limits of their express grant.

Although the respondent cites only cases in which this Court applied the exception to the established rule, it would seek to have this Court hold that the right of the State of Oklahoma to determine the riparian rights of its citizens along the Arkansas river is forfeited in all cases, merely because this Court found that the Oklahoma rule of navigability could not *be enforced against an express grant of the Federal government*. It is this contention which would inflict great and manifest injury upon this state, and this is one of the principal reasons why we

earnestly believe that *certiorari* should be granted in the present case.

III.

We agree with the respondent, as stated on Page 2 of its brief, that the question presented in this case is whether the Oklahoma Territorial Legislature had the power, by adopting the common law in the Territory, to "vest" the riparian owners with title to the river bed.

We again assert that this question has already been decided by this Court in *Wear* v. *Kansas*, 245 U.S. 154.

The respondent states on Page 16 of its brief that the decision in *Wear* v. *Kansas*, *supra*, merely held that it was not error for the Supreme Court of Kansas to take judicial notice that the Kansas River was navigable. *This is exactly what the* Supreme Court of Oklahoma did in *State* v. *Nolegs*, 40 Okla. 479, *in a case in which the essential circumstances were identical with those in the Kansas case.* The respondent states that in *Wear* v. *Kansas*, *supra*, the navigability of the river was admitted in the pleadings, but as this Court stated in its opinion (245 U.S. at Page 158), at least one of the riparian owners denied the navigability of the river and thus put that fact squarely in issue in the case.

If the Supreme Court of Kansas was held to be entitled to take judicial notice of the navigability of the Kansas River, how can it be held that the Supreme Court of Okla-

homa under identical circumstances shall be held not entitled to take judicial notice of the navigability of the Arkansas River? We have searched the respondents' brief carefully but in vain for their answer or for any legal or logical reasoning which would support the denial to Oklahoma of that which the Courts have so fully and firmly extended to Kansas. This same ominous silence upon this important point is noted in the opinion of the Tenth Circuit Court herein and in its summary denial of this precise question as submitted in our petition for rehearing.

CONCLUSION

We most earnestly repeat that such unequal treatment of the State of Oklahoma in contradistinction to the treatment which has been heretofore accorded the State of Kansas, marks departure from the established decisions of both the United States Supreme Court and the Supreme Court of Oklahoma which requires a review of the present case by this Court, and we most earnestly petition this Court that a Writ of Certiorari be granted and that upon final review the threatened inequality about to become final against the people of the State of Oklahoma, be corrected and that the decision of the Circuit Court of Appeals be reversed, and that the State of Oklahoma be granted such other and further relief as shall be found to be proper and just.

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January, 1947

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SUPREME COURT OF THE UNITED STATES.

October Term, 1946.

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA.

BRIEF *of* PETITIONERS.

Opinions Below.

No formal opinion was written by the District Court of the United States for the Northern District of Oklahoma. However, the findings of fact and conclusions of law of that court, rendered December 21, 1944, are in opinion form and are found at page 57 of the record.

The opinion of the Circuit Court of Appeals for the Tenth Circuit, 156 F. (2d) 769, was rendered July 29, 1946 (R., p. 141). Petition for rehearing was denied on August 29, 1946 (R., p. 161).

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, U. S. C., Title 28, Section 347(a).

Federal questions are presented by the conflicting contentions of the parties as to:

(*1*) The application of the constitutional doctrine of equality of states;

(*2*) The construction of the decisions of the United States Supreme Court in *Wear* v. *Kansas,* (245 U. S. 154) and *Brewer-Elliott Oil and Gas Company* v. *United States,* (260 U. S. 77) and the related decisions upon which those cases were based;

(*3*) The construction of the various treaties between the United States and the Cherokee Nation, the Acts of Congress and Executive Orders with reference to the conveyances from the Cherokees to the Otoes and Pawnees, the Proclamation of the President of the United States opening the Cherokee Outlet for settlement, and the Federal patents to the various Indian allottees who are the real plaintiffs in this case, all of which will be considered fully in the following sections of the brief.

Statement of the Case.

This case is between the State of Oklahoma and private claimants to determine whether the bed of the Arkansas river at the location in controversy shall belong to the whole people of the state, or whether it shall be divided among the various private owners of the lands along the shore. In a larger sense, the case involves the right of the State of Oklahoma to exercise the same sovereignty and control over the beds of its rivers generally, as is enjoyed by the older states of the Union.

The Arkansas river is the second largest tributary of the Mississippi on its western side, being over 2,000 miles in length. It rises in the Rocky Mountains of Colorado and flows thence through the States of Kansas, Oklahoma and Arkansas making its juncture with the Mississippi River near the southern boundary of Arkansas. The Arkansas

River is typical of the principal rivers which flow through the western plains states. These rivers, though not actually navigable under the Federal test, carry tremendous volumes of water. They have broad beds, sometimes exceeding a mile in width, which are not adaptable to private ownership but are of great actual as well as potential value to the public.

The State of Oklahoma has long claimed title to the Arkansas River bed (except the portions thereof granted to Indian Tribes prior to statehood) by virtue of a decision of the Supreme Court of Oklahoma rendered in 1914, seven years after statehood,[1] in the case of *State* v. *Nolegs*, 40 Okl. 479, in which judicial notice was taken of the fact that the Arkansas River is navigable throughout the state, and that the bed of the river belongs to the State of Oklahoma. Supporting the state's declaration of navigability were the circumstances that the river was meandered in the original survey,[2] that the Arkansas River had previously been held to be navigable both in Oklahoma[3] and Kansas[4], and that the later legislation of the state confirmed the judicial rule.[5]

In spite of these *indicia* of navigability, it is not pre-

1. Oklahoma was admitted as a state on November 16, 1907.
2. Only navigable streams are authorized by the Federal statute to be meandered. Title 43, U. S. C. A., Sec. 751.
3. United States v. Mackey, (U. S. District Court, Eastern District of Oklahoma) 214 Fed. 137.
4. Dana v. Hurst, (Supreme Court of Kansas) 86 Kan. 947. This case was followed by the Federal courts in Kansas in Jackson-Walker Coal and Material Company v. Hodge, (U. S. District Court, District of Kansas) 283 Fed. 457, and Shore v. Shell Petroleum Corporation, (U. S. District Court, District of Kansas) 55 F. (2d) 696, affirmed by the Circuit Court of Appeals, 10th Circuit, 60 F. (2d) 1.
5. This decision was re-enforced by a statute, enacted in 1919 (Title 64, Okla. Stats. 1941, Sec. 209), covering generally, all streams of two chains or over in width. This statute reads as follows:

   "The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared property of the State of Oklahoma." (Laws 1919, ch. 206, p. 293, par. 1.)

tended that this river is navigable under the Federal test of actual navigability,[6] for this court in *Brewer-Elliott Oil and Gas Company* v. *United States,* 260 U. S. 77, held that the Arkansas River at this location is not navigable under the Federal laws. However, in its opinion in that case, this court took pains to explain that it was not overruling the time honored doctrine that the state law of navigability is controlling in the *determination of local land titles,* and expressly approved the general practice of the states of reserving control over beds of their rivers by declaring them to be navigable, although in the language of the court, "they are not actually so." In the same opinion the court expressly affirmed its prior holding in *Wear* v. *Kansas,* 245 U. S. 154, to the effect that the State of Kansas had the right to acquire title to the bed of the Kansas river by taking judicial notice of the navigability of such river, irrespective of the fact. Hence, it is entirely immaterial for the purpose of the present case whether or not the Arkansas River is actually navigable at the location in controversy. The only real issue in this action is whether the state determination of navigability is the governing law of the case.

Petitioners' Theory of the Case.

The State of Oklahoma contends that the state law of navigability should be accepted as controlling in the present action for the following reasons:

(*1*) The portion of the river bed here in controversy was part of the public domain at the time Oklahoma was admitted as a state and was never granted to the riparian

6. The Arkansas River is actually navigable below its confluence with the Grand River in Eastern Oklahoma, but such portion of the river is not involved in the present case. See Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77.

owners by the United States.[7] Although the river bed had been granted by the United States to the Cherokee Nation in 1828,[8] (at a time when it was not contemplated that a state would ever be formed in the Indian country),[9] this portion of the bed was later, in 1891, ceded back to the United States by the Cherokees with other lands[10] and in 1893 was declared by the President of the United States to be part of the public domain, in the proclamation in which he opened for settlement the lands in northern Oklahoma commonly known as the Cherokee Outlet or Cherokee Strip.[11]

When the land involved in the present action was surveyed by the Federal Government in 1872, the bed of the Arkansas River was meandered, and the lots which were platted on the river banks did not include any portion of the river bed.[12]

After the survey was made, and prior to Oklahoma

7. Title 43, U. S. C. 931, might appear on its face to dispose of beds of nonnavigable rivers, but this statute does not cover the public lands involved in this case. It is shown in the historical note following this section in U. S. C. A. that this statute was derived from the Act of May 18, 1796 (1 Stat. 468), and the Act of May 3, 1803 (2 Stat. 235). The Act of May 18, 1796, applied only to the territory northwest of the Ohio River; so held in St. Paul and Pacific R. Co. v. Schurmeier, 272 U. S. 290; Kean v. Calumet Canal and I. Co., 190 U. S. 1145; Packer v. Bird, 137 U. S. 663. The Act of May 3, 1803, did not mention the beds of nonnavigable streams and in any event it applied only to the old Mississippi territory south of the State of Tennessee and east of the Mississippi River.

8. 7 Stat. 311.

9. See treaty between United States and Cherokees 1828, 7 Stat. 311.

10. Kappler Indian Affairs, Law and Treaties, Vol. 1, pp. 496 to 498.

11. 28 Statutes at Large 1222. The history of the title will be set forth in detail in the argument, infra. The government contended, in the courts below that the Cherokees conveyed a portion of the river bed here in controversy to the Otoe Tribe and hence, that such portion was not a part of the public domain. However, neither the United States District Court nor the United States Circuit Court of Appeals sustained the government on this point, and it does not appear to be an important issue in the case. (The government's contention did not apply to the Pawnee lands.)

12. Prints of the official government surveys covering the two townships here in suit, as introduced in evidence, are inserted in the appendix of this brief as Exhibits "A" and "B." The survey shown as Exhibit "A" covers Township 23 N., Range 3 E. (Otoe lands). The survey shown

statehood, the Government patented the lots on the south bank of the river at the location in controversy to members of the Otoe and Pawnee tribes, including the lots involved in the present action.[13] These patents conformed to the lot lines as shown on the above described survey and did not convey any portion of the river bed, nor did they indicate any intention of defining riparian rights. Hence, when Oklahoma was admitted to statehood, the bed of the Arkansas River at the location here in suit remained a part of the public domain. The State of Oklahoma is therefore not attempting to take the river bed away from the claimants in the present action, because these claimants never received title to the bed. On the contrary the state is merely asserting ownership of property, the title to which has never been severed from the public.

(*2*) This court has held by a long line of decisions that where a Federal grant does not define the riparian rights which shall attach as an incident to the grant, such rights shall be determined by state law,[14] and that the same rule applies to Federal grants to members of Indian tribes.[15] Since the patents in the case at bar did not expressly cover the river bed and did not expressly grant any riparian rights, the law of the State of Oklahoma governs in deter-

as Exhibit "B" covers Township 23 N., Range 4 E. (Pawnee lands). These surveys were introduced in evidence at pages 85, 86, and 96 of the record. The surveys do not appear in the printed record, but photostatic copies of the surveys accompany the original record as a part thereof.

13. Record, pages 100 to 106.

14. Barney v. Keokuk, 94 U. S. 324; St. Louis v. Myers, 113 U. S. 566; Packer v. Bird, 137 U. S. 661, 673; Hardin v. Jordan, 140 U. S. 371; Kaukauna Water Power Co. v. Green Bay and Mississippi Canal Co., 142 U. S. 254; St. Anthony Falls Water Power Plant v. Board of Water Commissioners, 168 U. S. 349; Hardin v. Shedd, 190 U. S. 508; Wear v. Kansas, 245 U. S. 154; Oklahoma v. Texas, 258 U. S. 574; Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77; United States v. Oklahoma Gas & Electric Co., 318 U. S. 206.

15. Oklahoma v. Texas, 258 U. S. 574; United States v. Oklahoma Gas & Electric Co., 318 U. S. 206; In re Heff, 197 U. S. 488; General Allotment Act of 1887, 24 Stat. at L. 388, Sec. 6.

ining what riparian rights, if any, shall attach to the tents in this case.

(3) This court has many times held, as a logical consequence of the above stated rule, that in determining the parian rights of private claimants the state law governs determining *what rivers are navigable,*[16] and that what a navigable water under the laws of the states, may be in ntra-distinction to the navigable waters of the United ates.[17] This court further held in this connection that nce a state may exclude riparian owners from ownership the beds of non-navigable streams by "expressly denying riparian title,"[18] the state may do the same thing by the pedient of declaring such streams to be navigable in law, en though they "are not actually so."[19]

The petitioners recognize that there is an *important xception* to this general rule, to-wit, that the states may ot invoke a rule of navigability, contrary to the fact, gainst the United States itself or against grantees of e United States whose rights to the river bed have beome vested by *express* grants of the United States.[20] Howver, this exception does not apply to the case at bar beause in this case, *the United States is not claiming title the river bed in its sovereign capacity and has not exressly conveyed the river bed or any riparian rights thereto the claimants in the present action.*

(4) This court applied the above stated principles in

. Packer v. Bird, 137 U. S. 661; Hardin v. Jordan, 140 U. S. 371; Donnelly v. United States, 228 U. S. 243; Wear v. Kansas, 245 U. S. 154.

. Daniel Ball v. United States, 10 Wall. 557; Donnelly v. United States, 228 U. S. 259-262.

. Brewer-Elliott Oil & Gas Company v. United States, 260 U. S. 77.

. Ibid.

. United States v. Oregon, 295 U. S. 2; Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77; Oklahoma v. Texas, 258 U. S. 574.

Wear v. *Kansas*, 245 U. S. 154, in which case the Supreme Court of Kansas had taken judicial notice of the navigability of the *Kansas* River under circumstances identical with those in the case at bar.[21] In that case, as here, the river will not sustain navigation, as has been conceded by the Supreme Court of Kansas.[22] In that case, as here, a Federal patent had been granted to an Indian, prior to statehood. In that case, as here, the territorial legislature had adopted the common law which, if effective, would have extended the title of the patentee to the center of the stream at the time the patent was issued. In that case, furthermore, the Kansas territorial legislature had actually declared the Kansas River to be nonnavigable. In spite of the foregoing, the Supreme Court of the United States held that the law of the State of Kansas, and not the territorial law, governed the ownership of the river bed, and upheld the state's title thereto.

The Supreme Court of Kansas in 1912 also took judicial notice of the navigability of the *Arkansas* River,[23] which is the same river as involved in the present action. Ever since its assertion of title as above stated the State of Kansas has exercised complete ownership and dominion over the Arkansas River bed. The state has issued many oil and gas leases covering the bed of this river, similar to the leases which are involved in the case at bar. Many producing wells have been drilled in the river bed in that state and the state has been collecting royalties derived therefrom, since the date of the first production years ago, without any protest from the United States or the riparian owners.[24]

21. State v. Akers, 92 Kan. 169.
22. Hurst v. Dana, 86 Kan. 947.
23. Hurst v. Dana, 86 Kan. 947.
24. Findings of Fact No. XI, Record, p. 62; for evidence, see Record, pp. 139, 49-56.

On the authority of *Wear* v. *Kansas, supra,* the Circuit Court of Appeals for the 10th Circuit, in *Shore* v. *Shell Petroleum Corporation,* 60 F. (2d) 1, upheld the right of the State of Kansas to thus assert title to the bed of the Arkansas River. Certiorari was denied, November 7, 1932, 287 U. S. 656.

The procedure adopted by the State of Kansas to successfully assert title to the bed of the Arkansas River was identical with the procedure employed by the State of Oklahoma in *State* v. *Nolegs.*[25]

It is certain, that the Arkansas River is the same river in both Kansas and Oklahoma (except that it is nearer its source in Kansas and is, therefore, smaller and less navigable) and it is also certain that the two states belong to the same Union and that their powers are absolutely equal under the same Constitution. To the people of Oklahoma it seems unthinkable that under these circumstances the ownership of the bed of this river could be confirmed in one state while denied to the other.

The Present Action.

The State of Oklahoma in pursuance of its claim of title, sold and delivered two oil and gas leases upon the portion of the Arkansas River bed here in controversy to the Champlin Refining Company on July 20, 1942, reserving the usual royalty in favor of the state.[26] The state's lessee has drilled two producing oil wells upon one of these leases,[27] which lease is now estimated by the state to have a value of $500,000.00.[28]

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25. 40 Okl. 479.

26. Exhibits "A" and "B" to Complaint, Record, pp. 13 and 19; admitted by answers, Record, pp. 21, 25.

27. Record, p. 62. At the time of the trial only one well had been completed on the lease.

28. A photograph of the main channel of the Arkansas River at the loca-

The title of the state and its lessee is being disputed in this action by certain Otoe and Pawnee Indians who prior to Oklahoma statehood, received Federal patents covering lands along the shore adjacent to the above described river bed leases. The present action was brought in the United States District Court for the Northern District of Oklahoma by the United States on behalf of the Indians above described, to quiet their alleged title, to eject the State of Oklahoma from possession of the river bed and to cancel the above described leases. The plaintiff's case is founded upon the contention that the common law, as adopted by the Territory of Oklahoma, had the effect of extending their patents to the center of the stream at the time the patents were issued.

The complaint shows that the United States is not asserting title to the river bed in its sovereign capacity, having

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tion in controversy together with the Champlin river bed well is reproduced opposite this page as Exhibit "C" of this brief.

By stipulation at page 46 of the Record, the parties agreed that a photograph of said well and of that portion of the Arkansas River in which it was drilled, taken on June 17, 1944, from a location on the south bank of the Arkansas River approximately 500 feet east of the said well, might be introduced in evidence. The photograph here reproduced as Exhibit "C" is a photograph of said well taken in conformity with the provisions of said stipulation and intended to be introduced in conformity therewith. However, by inadvertence, a different photograph of said well taken from an entirely different direction which does not show the main channel of the Arkansas River, was attached to the stipulation and such substitute photograph appears in the record at page 48a thereof. The water in the foreground of the inadvertently substituted photograph as it appears in the record is not the main channel of the Arkansas River, but is the small channel which runs around Turkey Island on the south side. The location of the well with reference to the main channel of the Arkansas River and of the small channel around Turkey Island is shown on plaintiffs' Exhibit "B," Record, p. 32a.

The state believes that it is essential to a clear portrayal of the location of the well in question, that a print of the photograph taken in conformity with the terms of the stipulation should be produced in the brief for the information of the Court.

Exhibit "C"

to the contrary elected to claim title for the Indian riparian owners as above stated.[29]

Upon trial of the case, the state announced that it would not introduce any evidence upon the question of navigability since it was the theory of the state that the Oklahoma rule of navigability had been settled by the decision in *State* v. *Nolegs*.[30] A stipulation (R., p. 45) was thereupon entered into to the effect that it would be construed that the plaintiffs had introduced evidence that the river was navigable in fact, and that the defendants had introduced no evidence as to navigability, and further that the defendants had objected to the introduction of evidence by the plaintiff on the issue of navigability, on the grounds that the law of the state, as expressed in *State* v. *Nolegs* was controlling on that issue.

After the trial, the United States District Court rendered judgment for the state, holding that the state law governed the riparian rights of the owners of the shore lands. The trial court found that the present action was indistinguishable from *Wear* v. *Kansas*[31] and relied chiefly upon the authority of that case in rendering its decision.[32]

The Decision of the Circuit Court of Appeals.

The United States Circuit Court of Appeals for the Tenth Circuit declined to apply the state law and reversed the judgment of the trial court on the sole ground that the common law, as adopted by the Territory of Oklahoma, had

29. Complaint, Record, pp. 10, 11 and 12; Conclusions of Law, Record, p. 64.

During the course of the proceedings, a stipulation (Record, p. 34) was entered into by all parties to the effect that the decision in the present case shall not be construed as res judicata against the United States, if the United States might wish at any future time to assert title to the river bed in its sovereign capacity.

30. 40 Okl. 479.

31. 245 U. S. 154.

32. Record, p. 62.

the effect of extending the patents to the center of the stream at the time of their issuance.[33]

That court attempted to distinguish the case at bar from *Wear* v. *Kansas* on two grounds: (1) that in *Wear* v. *Kansas* the state court had taken judicial notice of the fact that the river was navigable, whereas in the case at bar the trial court found that the Arkansas river was non-navigable in fact (although the trial court further found that it was bound by the state rule of property that the river was navigable in law); and (2) that the state rule of navigability was not binding upon the Indian allottees in the case at bar because it was promulgated in a case in which they were not parties.

The Circuit Court of Appeals failed to notice one of the principal contentions of the State of Oklahoma as set forth in the pleadings[34] and as proved by the evidence[35] to-wit: That the undeniable fact remains that the State of Kansas possesses ownership and control of the bed of the Arkansas River, and that to deny the State of Oklahoma the same privilege, under identical circumstances, would violate the constitutional doctrine of equality of states.

The Circuit Court of Appeals also failed to notice or distinguish its former decision in *Shore* v. *Shell Petroleum Company*, 60 F. (2d) 1, *certiorari* denied, 287 U. S. 656, in which it upheld the title of the State of Kansas to the Arkansas River bed.

It is the earnest contention of the State of Oklahoma that this obvious discrimination between two sovereign

33. Record, p. 149.
34. Record, pp. 27, 28.
35. Record, pp. 139, 49-56; Findings of Fact XI, Record, p. 62.

states of the Union was brought about by the failure of the Circuit Court of Appeals to follow the holdings of the Supreme Court of the United States in *Wear* v. *Kansas*[36] and *Erie Railway Company* v. *Tompkins*.[37]

The Circuit Court of Appeals said that the law of the Territory governed the disposition of riparian rights, but the Supreme Court of the United States in *Wear* v. *Kansas* rejected an identical contention and held that the state law governed such rights.

The Circuit Court of Appeals, in effect, held that the question of navigability was to be determined anew upon the trial of each case that might arise concerning the ownership of the river bed, but the Supreme Court of the United States said in *Wear* v. *Kansas* that the fact of navigability "is of a kind that should be established once for all, not perpetually retried."

The Circuit Court of Appeals said that it was not bound by the rule of property promulgated by the Supreme Court of Oklahoma in *State* v. *Nolegs*[38] because the riparian owners in the case at bar were not parties to that case. To the contrary, the Supreme Court of the United States has held that where the question is one of state law, the Federal court must render the same judgment which the state court would have rendered if it were deciding the case.[39]

The Circuit Court of Appeals relied upon the finding of the trial court that the Arkansas River was not navigable in fact at the location in controversy. But, since the Supreme Court of the United States has held that the state

36. 245 U. S. 154.
37. 304 U. S. 64.
38. 40 Okl. 479.
39. Wichita Royalty Co. v. United States, 306 U. S. 106.

law of navigability governs in such cases, it would seem too plain for refutation that if the state law governs, it cannot be changed by a finding of a Federal District Court, for if it could be thus changed it would cease to be the state law.

The decision of the Circuit Court of Appeals in the present case would, if allowed to stand, result in the utmost confusion as to riparian titles along the Arkansas River in both Oklahoma and Kansas and along similar rivers in other states. In Oklahoma, where certain portions of the Arkansas River bed were expressly conveyed by the United States to Indian tribes prior to statehood, a simple rule of property has prevailed, to-wit, that those portions of the river bed which were thus conveyed to Indian tribes remain the property of the grantees, whereas all other portions of the river bed are the property of the state. In Kansas, where no such conveyance of the river bed to Indian tribes occurred, the state has held undisputed title to the entire bed for many years. In both states, the decision of the Circuit Court of Appeals would upset the established title of the state and would cause every riparian owner along the banks of the river to sue the state to recover title to the bed, and for an accounting for all royalties received by the state. Those riparian owners who came within the jurisdiction of a Federal court and who could obtain a finding by such court that the river was nonnavigable in fact, would recover title to the portion of the bed opposite their riparian lots. On the other hand, those riparian owners whose cases remained in the state courts would doubtless be met by the state rule of navigability in law, in which event the state would retain title to the portions of the river bed involved in those cases. The confusion of titles which would thus result springs from the fact that the Circuit

Court of Appeals has not followed the doctrine of the United States Supreme Court in *Wear* v. *Kansas,* in which it said:

> "In this aspect it (the navigability of a river)[40] is a question of state law. * * * The fact is of a kind that should be established once for all, not perpetually retried."

The Cases in the State Supreme Court.

Companion cases to the case at bar are now before the Supreme Court of Oklahoma, which bring into sharp relief the confusion which would result if the decision of the Circuit Court of Appeals be allowed to stand.[41] Those cases are identical with the present action in all respects, excepting only that they involve different riparian lots, owned by non-Indians which adjoin different segments of the lease in question. The District Court of Pawnee County, Oklahoma, decided those cases in favor of the state, and made no finding that the Arkansas River is nonnavigable in fact, at the location in controversy. On the contrary, the state court rejected a request by the riparian owners for such a finding, and found instead that the river was navigable under the rule of property announced by the Oklahoma Supreme Court in *State* v. *Nolegs.*[42]

The narrow grounds upon which the Circuit Court of Appeals declined to follow *Wear* v. *Kansas,* therefore do not exist in the cases in the state court, and it is apparent that even the rule announced by the Circuit Court of Ap-

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40. Language in parentheses supplied.

41. Aladdin Petroleum Corporation v. State of Oklahoma, No. 32625; L. D. Oldham v. State of Oklahoma, No. 32629.

42. Record, Supreme Court of Oklahoma, Aladdin Petr. Corp., et al., v. State of Oklahoma, et al., No. 32625, pp. 225, 245, 246; L. D. Oldham, et al., v. State of Oklahoma, et al., No. 32629, pp. 246, 266, 267.

peals would require a decision for the state in those cases. If the Supreme Court of Oklahoma decides those cases in favor of the state, the state will retain title to the segments of the river bed involved in those cases, whereas under the decision of the Circuit Court of Appeals, the segments of the river bed involved in the present action would belong to the riparian owners. Thus in future litigation the title to the bed would depend upon whether the Federal jurisdiction or the state jurisdiction were invoked, which would be the exact reverse of the result which it was the intention of *Erie* v. *Tompkins* to accomplish.

Specifications of Error.

(*1*) The court erred in holding that the common law as adopted by the Territory of Oklahoma had the effect of extending the patents of the Indian allottees in this case, to the center of the Arkansas River at the time the patents were issued.

(*2*) The court erred in holding that the Oklahoma law of navigability does not govern the riparian rights of the Indian allottees in this case.

(*3*) The court erred in holding that the riparian rights of the Indian allottees in this case are governed by the finding of the trial court that the Arkansas River is nonnavigable in fact.

(*4*) The court erred in holding that the Indian allottees for whom this suit was brought, are the owners of the south half of the Arkansas River at the location in controversy.

(*5*) The court erred in holding that the State of Oklahoma has no title to the above described portion of the Arkansas river bed.

(*6*) The court erred in reversing the judgment rendered by the United States District Court for the Northern District of Oklahoma in this case.

ARGUMENT.

PROPOSITION 1.

The portion of the Arkansas River bed here in suit was not conveyed to the owners of the shore lands by either the United States or the State of Oklahoma. On the contrary such portion of the river bed was a part of the public domain at the time the patents involved in this action were issued, and remained a part of the public domain at the time Oklahoma was admitted to statehood.

To prove this proposition it will be necessary to trace the title of the Arkansas River bed from its first acquisition by the United States from the French Nation as a part of the territory included in the Louisiana Purchase.

Original grant of Cherokee Outlet to Cherokee tribe.

In 1828, 1833 and 1835, the United States made treaties with the Cherokee Nation by which it agreed to convey to that tribe a large amount of territory covering what is now the northeastern part of Oklahoma, together with an outlet to the hunting grounds of the Great Plains, which strip covers the entire northern part of Oklahoma and is commonly known as the Cherokee Outlet.[1] This territory included the Arkansas River at the location in suit and was formally deeded to the Cherokee Nation in December, 1838, in pursuance of the above described treaties.[2] This conveyance was made to the Cherokees at a time when it was not contemplated that a state would be formed in the Cherokee Nation.[3]

It having become apparent that the Cherokees had

1. 7 Stats. 311, 7 Stats. 414, and 7 Stats. 478.
2. Def. Ex. 1C, Record, p. 118; introduced, Record, p. 96.
3. See Treaty of 1828 with the Cherokees, 7 Stats. 311.

been granted more land than they would require, a treaty was made in 1866 between the United States and the Cherokee Nation by which it was agreed that the United States might settle any tribe of friendly Indians upon lands within the Cherokee country, west of the ninety-sixth meridian.[4] As this meridian is the eastern boundary of the Cherokee Outlet, the effect of the treaty was that friendly tribes might be settled anywhere in the Outlet.

Grants of lands in the Cherokee Outlet from the Cherokee tribe to the Osages, Pawnees and Otoes.[5]

Pursuant to the above treaty, Congress by Act of June 5, 1872,[6] authorized the Cherokee Nation to convey to the Osage tribe that portion of the Cherokee Outlet which now comprises Osage County, Oklahoma. This act described the tract conveyed as follows:

> "Bounded on the east by the 97th Meridian, on the south and west by the north line of the Creek country and the *main channel of the Arkansas river*,[7] and on the north by the south line of the State of Kansas."

It was held in *Brewer-Elliott Oil and Gas Company* v. *United States*,[8] that this act, by its express terms extended the conveyance to the center of the river and thus conveyed the north half of the river bed to the Osage tribe.

In September, 1872, the Federal Government's survey of the lands here in question was approved by the Commissioners of the General Land Office and was filed by them as the official government survey of such territory. Copies

4. 14 Stats. 799.
5. For the convenience of the court we have reproduced opposite this page as Exhibit "D" hereof a map of Oklahoma showing the various grants to Indian tribes within and adjoining the Cherokee Outlet.
6. 17 Stats. 228.
7. Emphasis will be ours in all quotations unless otherwise noted.
8. 260 U. S. 77.

of the portions of this survey pertaining to the townships which include the river lots here in suit, to-wit, Township 23 North, Range 3 East, (Otoe lands) and Township 23 North, Range 4 East (Pawnee lands) were introduced in evidence[9] and photostatic copies thereof accompany the printed record as a part thereof. Reproductions of these plats are shown in the appendix of this brief as Exhibits "A" and "B," respectively. These plats show that the bed of the Arkansas River was not surveyed and was not included within any township, section or lot lines, but was meandered as in the case of all rivers in which title to the bed was reserved to the public. None of the government lots along the bank of the river included any portion of the river bed.

It it worthy of note that the Federal government never attempted to sell or convey any portion of the river bed to any Indian tribes after the filing of this survey, having apparently decided that a state would eventually be formed in the Indian territory, and that the remaining portions of the river bed should be reserved to the public as in the older states.

Thereafter, in 1876, Congress set apart a portion of the Cherokee Outlet, together with a small portion of the Creek territory, as a reservation for the Pawnee tribe which reservation is a part of the present Pawnee County of the State of Oklahoma.[10] This reservation included Township 23 North of Range 4 East, which is one of the townships in suit. It is important to note that the description of such reservation in the Act of Congress above referred to reads as follows:

"All that tract of country *between* the Cimarron

9. Record, pp. 85, 86, and 96.
10. 19 Stats. 28.

and Arkansas Rivers embraced within the limits of Townships 21, 22, 23, 24 N., Range 4 E. * * *."

The use of the word "between" clearly indicates that neither the Arkansas River nor the Cimarron River was included within the reservation. Furthermore, the government survey above referred to did not include any portion of the river bed within Township 23 of Range 4, but on the contrary stopped the township lines at the river's edge.

On March 3, 1881, Congress authorized the Secretary of the Interior to move the Otoe and Missouria tribes from their then reservations in Kansas and Nebraska,[11] and on June 25, of that year the Secretary of the Interior issued an order setting apart a reservation of 129,113.20 acres for the Otoe and Missourias out of the Cherokee Outlet, which reservation is located in what is now Pawnee County, Oklahoma. Unlike the grant to the Osages, the Otoe reservation did not include any portion of the Arkansas River bed. On the contrary, this reservation included only that portion of the territory which lay on the river bank, as shown by the express language of the Secretary of the Interior's order. As the order is short, we quote it in full, omitting only the townships not involved in this action:

"Department of the Interior,
Washington, June 25, 1881.

"Sir: Agreeably to your recommendation of the 13th instant, the following described lands in the Indian Territory, west of the 96°, west longitude, in the tract ceded to the United States by the Cherokees, for the settlement of friendly Indians, by the sixteenth article of their treaty of July 19, 1866, are hereby designated and assigned for the use and occupation of the confederated Otoe and Missouria tribes of Indians, under

11. 21 Stats. 380.

the provisions of the Act of Congress approved March 3, 1881, (21 Stat., p. 381) namely • • •

"Also that portion of Township 23 North, Range 3 East, lying west of the Arkansas River, containing 14,098.84 acres.

"Total acreage, 129,113.20 acres.

"The papers which accompanied your letter before noted are herewith returned.

Very respectfully,

S. J. Kirkwood, Secretary,
The Commissioner of Indian Affairs."[12]

It is to be noted that this order used the words, "lying west of the Arkansas River," indicating the clear intention of the Federal Government that the bed of the Arkansas River should not be included in the Otoe reservation.

It is to be further noted that the portion of the said township which was set apart for the Otoes was stated in the order to contain 14,098.84 acres. The present county surveyor of Pawnee County has carefully computed the acreage shown on the government survey, using the acreage figures as shown thereon for each lot, section and fractional section contained in the said fractional Township 23 N. of Range 3 E., and has certified that the acreage of the said fractional township, as shown on the government plat, exclusive of the river bed, is 14,099.24 acres.[13] This certificate was corroborated by a similar certificate of Roy G. Collier, civil engineer.[14]

The acreage as shown by these certificates is only 4/10 of an acre different than the acreage as shown in the secretary's order. This difference is so slight as to be entirely

12. Plf. Ex. 5, Record, pp. 106-107; introduced, Record, pp. 77, 96.
13. Def. Ex. 9A, Record, p. 134; introduced, Record, p. 96.
14. Def. Ex. 9, Record, p. 128; introduced, Record, pp. 86, 96.

negligible, particularly in consideration of the intricacy of the computation, as shown by the work sheets attached to the affidavits. (Record, pp. 106, 134) The fact is evident, therefore, that the Federal Government, by order of the Secretary of the Interior set aside a stated number of acres in the said township as a reservation for the Otoes, and the official government survey shows that this stated number of acres comprises only that part of the said township which lies west of the river, *exclusive of the river bed.*

In 1883 Congress made an appropriation for the purchase from the Cherokees of these new reservations for the Pawnees, Otoes, Missourias, and the other Indian tribes which were settled in the Cherokee country. This Act of Congress[15] provides as follows:

> "That the sum of three hundred thousand dollars is hereby appropriated, to be paid into the Treasury of the Cherokee Nation, out of the funds due under appraisement for Cherokee lands *west of the Arkansas River,* which sum shall be expended as the acts of the Cherokee legislature direct, this amount to be immediately available; Provided, that the Cherokee Nation through its proper authorities shall execute conveyances, satisfactory to the Secretary of the Interior, to the United States, in trust only for the benefit of the Pawnees, Poncas, Nez Percés, Otoes and Missourias and Osages now occuyping said tract, *as they respectively occupy the same* before the payment of said sum of money."

It is important to note that this act uses the words "west of the Arkansas River," again clearly indicating the recognition by Congress that the lands of the Otoes and Missourias did not include the bed of the river.

It will also be noted that the statute states that the

15. 22 Stats. 624.

land granted to the Otoes shall be "as they respectively occupy the same." Previous to the enactment of the statute, the Secretary of the Interior had set apart the Otoe Reservation on the west bank of the river and had defined this reservation by number of acres, as above stated, showing clearly that no part of the reservation was in the bed of the Arkansas River. It is clear, therefore, that at the time of the enactment of the Federal statute, the land occupied by the Otoes was the reservation as defined by the Secretary of the Interior, and that the Federal statute, by stating that the grant shall be limited to the land "now occupied" by the Otoes, confirmed the intention that the grant should cover only the reservation on the west shore of the river.

Pursuant to the above described statutes and orders, the Cherokees executed formal conveyances on June 14, 1883, one of which was made to the United States in trust for the Otoes and Missourias[16] and the other to the United States in the trust for the Pawnees.[17] These deeds were drawn in almost identical language, each with the other, with the exception only of the property conveyed. They both recite that they are made in pursuance of the Act of Congress of 1883 above referred to,[18] by which, in the language of the deeds, "$300,000 was appropriated 'to be paid into the Treasury of the Cherokee Nation out of funds due unto appraisement for Cherokee lands *west of the Arkansas River*'."

The deed to the Pawnees then recite that it conveys:

"The following townships and fractional townships north and east of the Indian meridian, the

16. Plf. Ex. 7, Record, p. 111; introduced, Record, pp. 77, 96.
17. Plf. Ex. 6, Record, p. 107; introduced, Record, pp. 77, 96.
18. 22 Stats. 624.

fractional townships *being on the right bank of the river* * * * fractional Townships 23 and 24 North, Range 4 East. * * *"

The deed to the Otoes, in similar language, recites that it conveys:

"All those certain tracts of land lying and being in the Indian Territory embracing the following township and fractional township north and east of the Indian meridian, *viz.*, * * * fractional Township 23 N., Range 3 E., of the Indian meridian, *lying and being on the right bank of the Arkansas river.* * * *"*

The Otoe deed then goes on to recite that the entire reservation covered by the deed contains, in all 129,113.20 acres, which is exactly the same acreage as stated in the order of Secretary of the Interior above referred to.

Each deed refers to an annexed plat marked "A."[19] Each of these plats expressly shows that the Arkansas River is excluded from the territory covered by the deed and that the township lines stop at the edge of the river.

It is apparent from the foregoing statutes, orders and conveyances that neither the Pawnee nor Otoe tribes received title to any portion of the Arkansas River bed but that the bed in its entirety remained the property of the Cherokee Nation, excepting only that portion which had been expressly conveyed to the Osages.

We believe it clear that the language of the statutes, orders and conveyances support the above conclusions, but as further authority we respectfully cite the following:

(*1*) The grants to the Pawnees and the Otoes were made to those tribes as individuals and not as sovereign

19. Plf. Exs. 6 and 7; photolithograph copies of these plats appear in the Record at pp. 110a, 114a; introduced, Record, pp. 77, 96.

nations, since Congress, by the Act of March 3, 1871, (16 Stats. 566) provided, "that hereafter no Indian tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." (See preface of second edition of Kappler's Indian Laws and Treaties, Vol. 1.) The grants to the Otoes and Pawnees were made long after the above quoted Act of Congress, and hence were made to those Indians in the same manner and with the same effect as though the grants had been made to any other organization or private individuals.

(*2*) In *Barney* v. *Keokuk*, 94 U. S. 324, this court considered a grant to the half-breed Sac and Fox tribe covering lands on the shores of the Mississippi and Des Moines Rivers. This grant was strikingly similar to the grants in the present action, to the Pawnees and Otoes. In fact, the same word, "between" was used in both grants. The grant to the Pawnees was to the lands lying "*between*" the Cimarron and Arkansas Rivers,[20] and the grant to the half-breed Sac and Fox tribe covered lands lying "*between*" the Mississippi and Des Moines Rivers.

This court held, in *Barney* v. *Keokuk*, that the grant to the half-breed Sac and Fox Indians was to them as persons and not as a political body, that the riparian rights attaching to their grants were to be construed according to the law of the state and that according to the law of the State of Iowa, the grant did not include the river beds but stopped at the banks of the Mississippi and Des Moines Rivers. The court said:

"The peculiar origin of the title to the 'Half-breed Sac and Fox Reservations,' in the peninsula lying be-

20. 19 Stats. 28.

tween the Rivers Mississippi and Des Moines, *did not take it out of the general rule.* This was so held in the case of *Haight* v. *Keokuk,* cited above. (4 Iowa 199). That case was nearly identical with the present as respects the claim of the adjoining proprietor to the title of the land in Water Street and on the river bank. Haight contested the right of the city to control the wharf along said street, claiming, by virtue of his fee simple title, the right to erect a private wharf and to receive the emoluments thereof. His claim was overruled, and on the question of title the court said:

> 'According to the case of *McManus* v. *Carmichael,* then, Haight owns the soil to high water only. But here is interposed the argument, that this land is not held under the United States by the usual manner of grants, that is, by patent, after a survey, and described by section, town and range. This is true; but yet it will not affect the extent of the complainant's right. *The grant to the half-breeds was to them as persons and not as a political body.* The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary *between nations or states,* and then the line would have been the medium *filum aquae,* as it is now between Iowa and Illinois. * * * *The grant was to them as individuals, as tenants in common, and is to be construed as any other grant or sale to individuals'.*"

(*3*) The Supreme Court of the United States, in *Brewer-Elliott Oil and Gas* v. *United States,* 260 U. S. 71, affirmed the contention which we now make when it considered the language of the deed from the Cherokees to the Osages.

In its opinion in the above entitled case, the court first traced the title of the Osages and observed that the Con-

gressional Act of 1872 provided that the territory conveyed to the Osages shall be bounded by "the main channel of the Arkansas River," meaning the center of the stream. The court called attention to the fact that the deed which was later, in 1883, executed and delivered by the Cherokees to the Osages did not follow the description contained in the Act. Instead of describing the territory as bounded by the main channel of the Arkansas River, it described the tract by townships and fractional townships, "the fractional townships being on the left bank of the Arkansas River." This is almost exactly the same language as was contained in the deeds from the Cherokees to the Pawnees and Otoes in the present case (made the same date as the deed to the Osages). The court went on to say, however, that the title of the Osages was to be determined *not by the deed,* but by the Act of Congress, and since the Act carried the title to the center of the stream, the Act should govern in spite of the conflicting provisions in the deed. The language of the court is as follows:

> "We have no doubt that the title to the river bed is to be determined by the language of the Act of June 5, 1872, and that the meaning of the Cherokee deed is to be interpreted, *not as if its words stood alone,* but in the light of the Acts of Congress in pursuance of which it is made, and especially of the Act of 1872, under which the Osages took possession, and which was enough to vest in them good title to the land described therein *without the deed* of 1883."

The deed, therefore, was interpreted "not as if its words stood alone," but in a different or opposite manner than if its words stood alone, simply because the Act of Congress expressed a different intention. This is as strong an implication as the court could make (short of an express

holding, which was entirely unnecessary to the decision in that case) to the effect that the language of the deed would not have conveyed the river bed. We could ask no stronger affirmation of our contention that the deeds to the Pawnees and Otoes in the present case did not convey the river bed to that tribe, for in our case the Act of Congress, the order of the Secretary of Interior, and the deed all excluded the river bed from the conveyances.

Re-acquisition of Cherokee Outlet by United States.

Shortly after the Pawnees and Otoes were moved to their new reservations as above described, the unappropriated lands in the old Oklahoma Territory were opened for settlement, and the success of the famous run of 1889 led to a determination on the part of Congress to acquire the Cherokee Outlet for settlement in like manner. To accomplish this, Congress adopted the policy of purchasing back from the various Indian tribes the territory included in the Outlet, after which the lands in the various reservations were to be allotted to the members of the respective Indian tribes in severalty, and the remainder patented to settlers.[21]

Accordingly, the United States made a treaty with the Pawnee tribe in 1892[22] by which the Pawnees ceded their reservation to the United States, and agreed that the United States should allot the land to each individual member of the tribe in accordance with the General Allotment Act of 1887.[23] This treaty describes the territory thus ceded in exactly the same language as did the previous Act of Con-

21. Mills, Oklahoma Indian Land Laws, p. 407.
22. Kappler Indian Affairs, Laws and Treaties, Vol. 1, pp. 496-498; Def. Ex. 10, Record, p. 139 (by reference only); introduced, Record, pp. 87, 96.
23. 24 Stats. 389.

gress which had conveyed the property from the Cherokees to the Pawnees,[24] to-wit:

> "All of that tract of country *between the Cimarron and Arkansas Rivers* embraced within the limits of Townships 21, 22, 23 and 24 North of Range 4 East. * * *"

In 1893 Congress made an appropriation with which to pay the Pawnee tribe for the reservation thus ceded back to the United States. This statute[25] reads in part as follows:

> "That the sum of eighty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the same to be immediately available, to pay the Pawnee tribe of Indian Territory, for all their right, title, claim and interest of every kind and character in and to all that tract of country *between the Cimarron and Arkansas Rivers* embraced within the limits of seventeen specified townships of land, ceded, conveyed, and relinquished to the United States by said Pawnee tribes of Indians, by article one of an agreement concluded on the twenty-third day of November, eighteen hundred and ninety-two between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed commissioners on the part of the United States, and said Pawnee tribe of Indians. * * *"

The use of the word "between" again indicates the recognition by Congress that the Pawnee tribe had never owned any portion of the Arkansas River bed. It is also clear from the foregoing that the Pawnees relinquished to the United States every vestige of title which they had ever owned in any and all lands which they had acquired in Oklahoma. However, such relinquishment does not affect the title to the river bed as the Pawnees never held title thereto.

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24. 19 Stats. 28.
25. 27 Stats. 568, Sec. 12.

No treaty was made with the Otoe and Missouria tribes, their lands being allotted to the individual members of the tribe by authority of the General Allotment Act of 1887.[26] However, as the Otoes had never acquired the bed of the Arkansas River, it was not necessary that they should relinquish any title thereto.

On December 19, 1891, a treaty was made with the Cherokees by which they ceded to the United States all of their remaining right, title and interest in and to the Cherokee Outlet including the bed of the Arkansas River.[27] The all-inclusive nature of this cession is shown by the first article of the treaty which reads as follows:

> "The Cherokee Nation by act duly passed shall cede and relinquish all its title, claim, and interests of every kind and character in and to that part of the Indian Territory bounded on the west by the State of Kansas; on the east by the ninety-sixth (96°) degree of west longitude, and on the south of the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation, created or defined by Executive Order dated August 10, 1869. The tract of land embraced within the above boundaries containing eight million, one hundred and forty-four thousand, six hundred and eighty-two and ninety-one one hundredths (8,144,682.91) acres more or less."

The above description defines the Cherokee Outlet and includes the Arkansas River at the location in suit.

In 1893, Congress approved the above described treaty and made an appropriation to pay the Cherokees for the

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26. Mills, Oklahoma Indian Land Laws, p. 407; 24 Stats. 389.
27. Kappler, Indian Affairs, Laws and Treaties, Vol. 1, pp. 490-492; Def. Ex. 12, Record, p. 139 (by reference only).

territory thus ceded.[28] This Act of Congress reads in part as follows:

> "That the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars payable as hereinafter provided is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the Secretary of the Interior is hereby authorized and directed to contract to pay eight million, three hundred thousand dollars, or so much thereof as may be necessary in addition, to pay the Cherokee Nation of Indians for all the right, title and interest and claims which the said nation of Indians may have in and to certain lands described and specified in an agreement concluded between David H. Jerome, Alfred M. Wilson and Warren G. Sayre, duly appointed commissioners on the part of the Cherokee Nation of Indians in the Indian Territory, on the nineteenth day of December, eighteen hundred and ninety-one, bounded on the west by the one-hundredth degree of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth degree of the west longitude, and on the south by the Creek Nation, the Territory of Oklahoma and the Cheyenne and Arapahoe Reservation, created or defined by Executive order dated August tenth, eighteen hundred and sixty-nine; * * * "

The comprehensive terms of the treaty and the Act of Congress which ratified it, leave no doubt that the Cherokees relinquished to the United States all interest of every kind and character, which they may have had in the territory contained in the Cherokee Outlet. As noted above, the Cherokees had retained title to the bed of the Arkansas River throughout its entire course in the Cherokee Outlet, excepting only the portion expressly conveyed to the Osage tribe. It is clear, therefore, that by the terms of the cession

28. 27 Stats. 557, Sec. 10.

by the Cherokees above noted the entire bed of the Arkansas River in the Cherokee Outlet, excepting the portion previously conveyed to the Osage tribe, became the property of the United States as part of the public domain.

This was expressly confirmed by the Presidental Proclamation of August 18, 1893,[29] by which the Cherokee Outlet was opened for settlement.

The proclamation first recites that the Cherokee Nation had previously

> "ceded, conveyed, transferred, relinquished and surrendered all of its title, claim and interest of every kind and character * * *"

in and to the Cherokee Outlet. The proclamation then declares that all of the lands thus acquired from the Cherokees and Pawnees (together with the other lands making up the Cherokee Outlet) would be open for settlement, saving and excepting only the lands in the Osage and Otoe reservation.

The pertinent parts of the proclamation are quoted as follows:

> "Now, therefore, I, GROVER CLEVELAND, President of the United States, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by other laws of the United States, and by said several agreements, do hereby declare and make known that *all the lands acquired from the Cherokee Nation of Indians,* the Tonkawa tribe of Indians, *and the Pawnee tribe of Indians,* by the three several agreements aforesaid will at the hour of twelve o'clock noon (Central Standard Time) on Saturday the sixteenth day of the month of September, A. D. eighteen hundred and ninety-three, and not before, be opened to settlement under the terms

29. 28 Stats. 1222.

of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, the laws of the United States applicable thereto and the conditions prescribed by this proclamation, *saving and excepting* lands described and identified as follows, to-wit: The lands set apart for the Osage and Kansas Indians, being a tract of country bounded on the north by the State of Kansas, on the east by the ninety-sixth degree of west longitude, on the south and west by the Creek country and *the main channel of the Arkansas River;* the lands set apart for the confederated Otoe and Missouria tribes of Indians, described as follows, to-wit: Township Twenty-two North, Range One East; Township Twenty-three North, Range One East; Township Twenty-two North, Range Two East; Township Twenty-three North, Range Two East; Township Twenty-two North, Range Three East; and that portion of Township Twenty-three North, Range Three East, *lying west of the Arkansas River;* * * *" (and other lands not involved in this case).

It is highly significant that the President took pains in his proclamation to state that the Osage reservation was bounded "by the main channel of the Arkansas River," and to further state that, on the contrary, the Otoe reservation was comprised of lands *"lying west of the Arkansas River."*

On this account, it is clear that the south half of the Arkansas River bed, adjoining the Otoe reservation, was declared to be a part of the public domain, because in the proclamation the Otoe reservation was declared to be confined to lands "lying west of the Arkansas River." It is equally clear that the north half of the Arkansas River bed within the Osage reservation was declared not to be a part of the public domain, because, in the proclamation, the

Osage reservation was declared to extend to "the main channel of the Arkansas River."

There is nothing unusual in the circumstance that the north half of the Arkansas River is owned by the Osage tribe under the express Federal grant and the south half of the river bed is reserved to the public. This same condition was approved by the Supreme Court of the United States as to the Red River in *Oklahoma* v. *Texas*, 258 U. S. 574. In that case, the United States had made an express grant of the north half of the Red River to the Kiowa, Commanche, and Apache tribes but no grant of the south half of the river bed had been made.

This court in *Oklahoma* v. *Texas* confirmed the title of the Kiowa, Commanche and Apache tribes to the north half of the Red River but refused to extend their title beyond the limits of their express grant. This left the south half of the Red River as a part of the public domain, and this court confirmed the title of that portion of the river bed in the United States in its sovereign capacity.

In the present case the south half of the Arkansas River has never been conveyed to any Indian tribe or any other person and hence it also has remained a part of the public domain. The only difference between the case of the Red River and that of the Arkansas is that in the former case, the United States elected to retain title to the south half of the river bed, whereas in the case of the Arkansas River, the United States has not elected to assert title, thus permitting the south half of the Arkansas River bed to pass to the State of Oklahoma as trustee for the public.

Allotment of Pawnee and Otoe lands.

After the Cherokee Outlet had been opened for settlement, the Federal Government proceeded to distribute the lands in the Pawnee and Otoe reservations to the members of those tribes in severalty under authority of the General Allotment Act of 1887.[30]

Accordingly, the Government issued the trust patents which are involved in the case at bar as follows:

PAWNEES.

Patent dated October 9, 1893, to William Bayhylle, covering Lot 6, of Section 17, Township 23 North, Range 4 East (together with other lands);[31]

Patent dated October 9, 1893, to Horace Field, covering Lots 1, 2, and 3 of Section 19, Township 23 North, Range 4 East (together with other lands);[32]

OTOES.

Patent dated November 24, 1906, to Ethel Lewis Barnes, covering Lots 5, of Section 24, Township 23 North, Range 3 East (together with other lands);[33]

Patent dated June 10, 1907, to Anna Robedeaux, covering Lot 6 of Section 24, Township 23 North, Range 3 East (together with other lands).[34]

All of the above patents described the lands by lot numbers, and a reference to the official Government survey[35]

30. Mills, Oklahoma Indian Land Laws, p. 407; 24 Stats. 389.
31. Plf. Ex. A, Record, p. 100; introduced, Record, pp. 75, 96.
32. Plf. Ex. 2, Record, p. 102; introduced, Record, pp. 75, 96.
33. Plf. Ex. 3, Record, p. 103; introduced, Record, pp. 75, 96.
34. Plf. Ex. 4, Record, p. 105; introduced, Record, pp. 75, 96.
35. See Exhibits "A" and "B" in the appendix to this brief. Def. Exs. 7 and 8; introduced, Record, pp. 85, 86, 96. (Photostatic copies of these plats accompany printed Record as a part thereof.)

shows that the said lots were confined to the bank of the river and did not cover or include any portion of the bed.

PROPOSITION 2.

Since the Federal patents in the case at bar did not expressly convey the river bed and did not expressly grant any riparian rights, the law of the State of Oklahoma governs in determining whether or not the title of the riparian owners extends to the center of the Arkansas river.

(1) ***The state law determines the extent of the riparian rights, which attach as an incident to Federal patents in all cases in which the patent does not define such rights.***

This rule has been upheld in a long line of decisions of the Supreme Court of the United States, from which we quote:

Brewer-Elliott Oil and Gas Company v. *United States,* 260 U. S. 89:

> "In Government patents containing no words showing purpose to define riparian rights the intention to abide the state law is inferred."

Hardin v. *Jordan,* 140 U. S. 402:

> "In our judgment the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.
>
> • • • • • • • •
>
> "Beyond all dispute, the settled law of this court, established by repeated decisions, is that the question of how far the title of a riparian owner extends is one of local law. For a determination of that question the *statutes of the state and the decisions of its highest court furnish the best and the final authority.*"

Kaukauna Water Power Co. v. *Green Bay & Miss. Canal Co.*, 142 U. S. 271:

"It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. * * * *With respect to such rights we have held that the law of the state as declared by its Supreme Court, is controlling as a rule of property.*"

Shively v. *Bowlby*, 152 U. S. 57:

"By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case."

St. Anthony Falls Water Power Company v. *Board of Water Commissioners*, 168 U. S. 366:

"The jurisdiction of the state over this question of riparian ownership has been always, and from the foundation of the Government, recognized and admitted by this court. The extent of the plaintiff's riparian right of property was therefore the subject of adjudication by the state court, and the rule has been definitely stated by that court in its judgment, which is now under review:"

"* * * it does not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts."

Rundel v. *Delaware and Raritan Canal Co.*, 55 U. S. 80:

"It is evident, that the extent of the plaintiff's rights as a riparian owner * * * must depend on the laws and customs of Pennsylvania, as expounded by her own courts."

(2) *The above stated rule applies to non-navigable streams as well as to navigable streams.*

Hardin v. *Shedd*, 190 U. S. 519:

"When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. Nevertheless, it has become established almost without argument *that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies.*"

(3) *The same rule applies to Federal patents to Indians and Indian tribes.*

Oklahoma v. *Texas*, 258 U. S. 594:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance

should be construed and given effect in this particular according to the law of the state in which the land lies. *Where it is disposing of tribal land of Indians under its guardianship, the same rules apply.*"

The above language was quoted with approval in *Brewer-Elliott Oil and Gas Co.* v. *United States*, 260 U. S. 77.

This court has affirmed this rule in the very recent case of *United States* v. *Oklahoma Gas & Electric Co.*, 318 U. S. 209-210, in which it was held that the rights of the public to a highway easement on the lands of Indian allottees adjoining a state highway are to be determined by the laws of Oklahoma, and said;

> "It is well settled that a conveyance by the United States of land which it owns beneficially, or, as in this case, for the purpose of exercising its guardianship over Indians, *is to be construed, in the absence of any contrary indication of intention, according to the law of the state where the land lies.*"

Supporting this conclusion the court said further at p. 211:

> "The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the state, and then only by permission of the Secretary, subject to compliance with 'such requirements as he may deem necessary.'
>
> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear."

These words are significantly applicable to the case at bar, for in the present case the State of Oklahoma is subjecting the Indians "only to the same rule of law as are others in the state." Furthermore, the shore of the Arkansas River is "spotted with restricted lands held in trust for Indian allottees" and "complication and confusion would follow from applying to * * * such lands rules differing from those which obtain as to lands of non-Indians."

The rule announced in the above quoted cases finds support in the General Allotment Act of 1887, under which the Pawnee and Otoe lands involved in the case at bar were distributed. This statute reads in part as follows:

> "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of *and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.*" (24 Stats. 389, Section 6.)

The Supreme Court in *Re Heff*, 197 U. S. 503, declared that under such act the Indians became subject to the state laws immediately upon issuance of the trust patent. The court said:

> "So far as his political statute is concerned, the allottee is declared to be a citizen— not that he will be a citizen after twenty-five years have passed and a second patent shall have been issued."

PROPOSITION 3.

The adoption by the Supreme Court of Oklahoma of the rule of property that the Arkansas River is navigable had the effect of excluding the riparian owners from ownership of the bed and vested title in the State.

(1) ***The state law governs in determining what shall be deemed a navigable water within the meaning of the local rules of property.***

Donnelly v. *United States*, 228 U. S. 262:

"But it results from the principles already referred to that *what shall be deemed a navigable water within the meaning of the local rules of property* is for the determination of the several states."

Hardin v. *Jordan*, 140 U. S. 382:

"This right of the states to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes which are treated as inland sea; and also, in some states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state *to what waters* and to what extent this prerogative of the state over the lands under waters shall be exercised."

Packer v. *Bird*, 137 U. S. 669:

"* * * In this case *we accept the view of the Supreme Court of California* in its opinion as expressing the law of that state, *'that the Sacramento River being navigable in fact,* the title of the plaintiff extends no farther than the edge of the stream'."

United States v. *Holt State Bank*, (C. C. A. 8) 294 Fed. 165:

"Moreover, since the settled law has become that

the rights and interests of riparian owners on the shores of lakes and rivers to the lands under the waters upon which they border are determinable by the laws of the state in which the lands lie, and since such rights and interests are often conditioned by the navigability of such waters, *it logically follows, and has long since become the law of the land, with some exceptions not material in consideration of this case* (*Brewer-Elliott Oil & Gas Co.* v. *United States,* (C. C. A.) 270 Fed. 100, 107, 109) *that in the determination of the rights of riparian owners to the lands under the water upon which their lands border, what shall be deemed a navigable water must be determined by the law of the state in which the riparian lands lie.*"

(2) *The state rule of navigability may be the opposite of the Federal rule.*

In the leading cases in which the Supreme Court of the United States laid down the Federal rule of navigability, this court recognized that the state laws of navigability might be in contradistinction to the Federal rule.

Daniel Bell v. *United States,* 10 Wall. 557:

"And they constitute navigable waters of the United States within the meaning of the Acts of Congress in *contradistinction from the navigable waters of the states,* when they form in their ordinary condition by themselves, a continuous highway over which commerce is or may be carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water."

Donnelly v. *United States,* 228 U. S. 262:

"The question of the navigability in fact of non-tidal streams is sometimes a doubtful one. It has been held in effect that what are navigable waters of the

United States, within the meaning of the Act of Congress, *in contradistinction to the navigable waters of the states,* depends upon whether the stream in its ordinary condition affords a channel for useful commerce."

As an example, the Mississippi River is of course navigable under the Federal test of navigability in fact. However, in *Hardin* v. *Jordan,* 140 U. S. 371, the Supreme Court of the United States called attention to the fact that at the time of that decision the Mississippi River was not navigable under the laws of Illinois because that state held to the old English rule that a river was not navigable if not tidal.

Also, in *Escanaba Trans. Co.* v. *Chicago,* 107 U. S. 582, this court observed *"that in some states"* the old English law that no water was navigable unless affected by the tide, still governed the rights of riparian owners to the beds of streams in those states.

And in *Barney* v. *Keokuk,* 94 U. S. 224, this court commented upon the fact that the English rule of navigability had for two generations been adopted *by many states* as the doctrine upon which ownership of the soil in navigable waters was based, and then added:

"Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, *is for the several states themselves to determine.*"

In the recent case of *United States* v. *Appalachian Electric Power Company,* 311 U. S. 408, this court again recognized that navigability for the purpose of fixing the ownership of a river bed was distinct from navigability for the purpose of regulation of commerce. The court said:

"Although navigability *to fix ownership of the river bed* or riparian rights is determined as the cases just cited in the notes show, as of the formation of the

Union in the original states or the admission of statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise."

And this court, in the same opinion, recognized the control of the states for the local purpose above cited. The court said:

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers'."

(3) *Since the riparian owners in this action never received title to the river bed, they cannot maintain this suit to quiet title against the state, regardless of whether the State of Oklahoma or the United States owns the river bed.*

Authority for the above proposition is found in *Marshall Dental Mfg. Company* v. *Iowa*, 226 U. S. 460:

"By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of the adjoining lake. (Citing cases.) *It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the state.*

"The question as to the title to the bed is treated as open in *Hardin* v. *Shedd*, 190 U. S. 508, 519 * * * and *Whitaker* v. *McBride*, 197 U. S. 510, 515 * * * and there is not need to decide it now. It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake *sufficient to entitle it to maintain this suit against an intruder without title, whether the state owns the bed or not. The principle has been affirmed and acted on by the court so recently that it does not require further argument here.*"

Further authority is found in *Hardin* v. *Jordan,* 140 U. S. 371, in which the court said that in quiet title actions,

> "• • • *the plaintiff must stand or fall by his own title,* and not by reason of any defect in the title of the defendant."

Although we are firmly convinced that the present action may be decided, as were the above cited cases, wholly on the grounds that the plaintiffs have no title, we propose to show affirmatively that under the settled decisions of this court, the State of Oklahoma may exercise ownership and control of the Arkansas River bed.

(4) *Since a state may exclude riparian owners from title to the beds of nonnavigable streams by expressly denying a riparian title, the state may accomplish the same result by the expedient of declaring such streams to be navigable in law and thereby preserve title to such beds in the public.*

Brewer-Elliott Oil and Gas Company v. *United States,* 260 U. S. 77:

> "Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river *granted* and vesting before statehood, depends for its validity on nonnavigability of the stream in fact.
>
> "In *Wear* v. *Kansas,* 245 U. S. 154, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood, to land bordering on the Kansas River, without restriction, reservation, or expansion. The state tribunals took judicial notice of the navigability of the riv-

er, refused to hear evidence thereon, and held that the patent to land on the navigable stream did not convey the bed of the river. *The United States, by its unrestricted patent, was properly taken to have assented to its construction according to local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a nonnavigable stream, was immaterial. In either view the result there would have been the same.*"

We respectfully submit that the above quotation contains the controlling law of this case.

As an example of a situation in which, "the local law worked its purpose by expressly denying a riparian title," this court, in its opinion in the case of *Hardin* v. *Jordan*, 140 U. S. 393, recognized that certain of the original states had retained title to the beds of their public waters, regardless of navigability. The court said:

> "These ordinances seem to have been the foundation of a local common law in Massachusetts (including Maine) which has led to a course of decisions with regard to the title of lakes and ponds *at variance with the common law*, and which have been followed in New Hampshire and some other states. It is there held that the land under water in such lakes and ponds *belong to the state*, and not to the riparian owners; and that when land is conveyed bounding upon a natural lake or pond, the grant extends only to the water's edge."

It is apparent that under the doctrine of equality of states, the new states have the same right to retain the beds of their public waters as did the original states, and that, as above stated in *Brewer-Elliott Oil and Gas Company* v. *United States*, the states may do so "by conclusively determining the navigability of the stream without regard to the fact."

(5) ***Although there is an exception to this general rule, to-wit, that the states may not invoke a rule of navigability contrary to the fact, against the United States itself or against grantees of the United States whose rights to the river beds have become vested by express grants, this exception does not apply to the case at bar because in this case the United States is not claiming title to the river bed in its sovereign capacity[36] and it has not expressly conveyed the river bed or any riparian rights therein to any claimants in the present action, or otherwise.***

Examples of this exception to the general rule are found in the following cases:

In *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77, this court awarded the north half of the Arkansas River to the Osage tribe because the United States had *expressly* conveyed such portion of the river bed to the Osages prior to Oklahoma statehood. The court said at page 87:

> "If the Arkansas River is not navigable, then the title of the Osages as granted certainly included the bed of the river as far as the main channel *because the words of the grant expressly carry the title to that line.*"

The court applied the Federal rule of navigability in fact in that case because it was construing an *express* Federal grant of the river bed. However, there is no Federal grant of the river bed involved in the case at bar, nor is there any implication whatsoever of Federal intent to convey more land than was actually described in the various conveyances of the shore lands. Hence, under the decisions quoted under Proposition 1 of this brief, the state law of navigability, and not the Federal law, governs the riparian

36. Complaint, Record, pp. 10, 11, 12; Stipulation, Record, p. 34; Conclusions of Law, Record, p. 64.

rights of Indian allottees in the present case. The court recognized this general rule by stating at page 88 of the opinion in the *Brewer-Elliott* case:

> "It is true that where the United States has not in any way provided otherwise, the ordinary incident attaching to a title traced to a patent of the United States under the Public Land Laws *may be determined according to local rules.*"

In *United States* v. *Oregon*, 295 U. S. 6, the court held, that a state could not invoke a rule of navigability contrary to the fact so as to deprive the United States (in its sovereign capacity) of its superior title. The court, however, recognized that the state law is supreme in defining the riparian titles of private claimants for it said later in the opinion in that case at page 28:

> "The construction of grants by the United States is a Federal, not a state, question (citing cases), and involves the consideration of state questions only in so far *as it may be determined as a matter of Federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances* (citing cases). In construing a conveyance by the United States of land within a state, *the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.*"

The state law in this regard therefore becomes the Federal law *by the assent of the United States.*

In *Oklahoma* v. *Texas*, 258 U. S. 574, this court declined to follow the Oklahoma rule of navigability contrary to the fact, because in that case the United States had made an *express* grant of the north half of the Red River bed to Indian tribes prior to statehood, and had retained title

(in its sovereign capacity) to the south half of the river bed. However, this court again recognized the general rule that state laws govern the riparian rights of private claimants who have received no express grant to the river bed, in the following language found at page 594, which we repeat for emphasis:

> "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, *if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies.* Where it is disposing of tribal land of Indians under its guardianship, the same rules apply."

PROPOSITION 4.

The Oklahoma rule of property that the Arkansas River is navigable and that the bed belongs to the state is clear and unequivocal and has been the settled law of this state since its promulgation shortly after Oklahoma was admitted to statehood.

The Oklahoma Supreme Court said in *State* v. *Nolegs*, 40 Okl. 479:

> "The above cases of *Dana* v. *Hurst, supra,* and *United States* v. *Mackey, supra,* both being exhaustive and well-considered opinions, the same are approved by this court, and we hold that the Arkansas River is a navigable stream in its entire course through the

State of Oklahoma, and that the title of the bed thereof, to the high-water mark, is in the state. * * *"

The Oklahoma court "had in its favor"[37] the fact that the river had been meandered in the original Federal survey and that the Arkansas River had previously been held to be navigable both in Oklahoma and Kansas in the cases noted in the above quotation.

In Oklahoma the river had been held to be navigable in *United States* v. *Mackey,* (U. S. D. C., E. D. Okla.), 214 Fed. 137, in the following language:

> "Is the Arkansas River a navigable stream so far as concerns the question of the title to the bed thereof? That it is was practically conceded at the oral argument. This question was answered in the affirmative by the Supreme Court of Kansas in the case of *Dana* v. *Hurst,* 86 Kan. 947, 122 Pac. 1041, decided last February, for reasons which appear to me to be sound, set forth in a well considered opinion. We therefore start with the proposition that the Arkansas River is a navigable stream."

In Kansas, the Arkansas River had been held navigable in *Hurst* v. *Dana,* 86 Kan. 947, in the following language:

> "But, considering the character, width and length of the river, the various acts and declarations by Congress in reference thereto and the policy shown thereby with reference to waters which more than 100 years ago were navigable according to the needs and uses of that time and which led into the Mississippi, we deem it justifiable to hold, and do hold, that, *while the stream is not now navigated in fact anywhere in Kansas, it has nevertheless, not ceased to be a highway set apart by national act and declaration for public use in the manner and at the time to be determined upon by the Federal Government.*"

37. See Wear v. Kansas, 245 U. S. 154.

In the case of *Vickory* v. *Yahola Sand and Gravel Co.*, 158 Okl. 122, the Oklahoma Supreme Court expressly reaffirmed the *Nolegs* decision, subject only to the modification that it does not apply to portions of the Arkansas River bed which were expressly conveyed by the United States to Indian tribes prior to statehood. The court said:

> "It will be observed that the general rule announced in the *Nolegs* case to the effect that the ownership of the navigable waters and the soil under them within the present boundaries of the State of Oklahoma is in the state, as announced by the District Court in the *Brewer-Elliott* case, *supra*, that 'a state takes title to the bed of navigable streams in its borders, and, subject to the paramount authority of Congress to control navigation in the regulation of interstate and foreign commerce, may appropriate and dispose of minerals found in the beds of such streams,' *has never been repudiated or disputed in any of the cases cited*, except perhaps to say that Congress had the power before statehood to convey by grant any of such lands, whenever it became necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory."

PROPOSITION 5.

This Court applied the above stated principles in *Wear* v. *Kansas*, 245 U. S. 154, and in that case upheld the title of the State of Kansas to the bed of the Kansas River under circumstances identical with those in the case at bar.

The case of *Wear* v. *Kansas* concerned the title to the

bed of the Kansas River which is a smaller river than the Arkansas and is admittedly non-navigable in fact.[38]

The State of Kansas had passed a statute regulating the sale of sand from the beds of the navigable rivers of the state and providing for the payment to the state of royalties for all sand thus sold. The action in question was brought in the state court under the title of *State* v. *Akers* (92 Kan. 169), against the state treasurer and certain riparian owners to test the constitutionality of the statute. The riparian owners claimed that the Kansas River was not navigable in fact and that they, the riparian owners, owned the bed and that the State of Kansas had no title to the bed or to the royalties therefrom.

The state court refused to hear evidence, took judicial notice of the navigability of the stream, and held that the state owned the bed to the exclusion of the riparian proprietors for the reason, in the language of the court:

> "That Kansas entered the Union upon an equal footing with the other states; that upon her admission into the Union absolute property in and dominion and sovereignty over the soils under the navigable *and public streams* within its limits passed to the state, in trust for all the people, subject to the superior rights of the Federal government with respect to navigation."[39]

The Supreme Court of the United States in *Wear* v. *Kansas, supra,* affirmed the state court in all respects.

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38. See Hurst v. Dana, 86 Kan. 947, in which the Kansas Supreme Court said:

> "For a generation or more land transportation has so far superseded the use of water craft in this region that even the Missouri, a stream known to be navigable in fact and in law, has ceased to float upon its waters along the boundary of this state any appreciable commerce of the country, *and the Kansas which we have judicially noticed as navigable* (Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330), *floats none at all.*"

39. State v. Akers, 92 Kan. 169.

The opinion in *Wear* v. *Kansas* shows, that one of the riparian owners made the contention that the river was navigable because the Territorial Legislature had adopted the common law of England, and that the other riparian owner, Fowler, contended squarely that the river was not navigable in fact. The court said:

> "This case was decided on a motion to quash the answers, the allegation of which, so far as now material, may be summed up as follows: In 1859, the Territorial Legislature of Kansas enacted that the territory should be governed by the common law of England, which still remains the law of the state. On October 1, 1860, the United States conveyed land adjoining the Kansas River to the predecessor in title of the plaintiffs in error, and, as the tides do not ebb and flow in the river, *they allege that the conveyance carried title to the middle of the stream.*
>
> • • • • • • • •
>
> "But the plaintiff in error, Fowler, while adopting this allegation, *alleges that it is not and never has been a navigable stream,* and in 1864 the Kansas legislature made a declaration to that effect."

The court then considered the contention that the river was non-navigable under the common law and in the following language expressly denied that the patents carried to the center of the stream under such theory:

> "The argument of the plaintiffs in error does not need a lengthy response or a statement of all the answers that might be made to it. *It was said that the territorial statute gave to the patent of the United States the effect of a grant ad filum aquae. But this attributes to detailed and precise an effect to a general provision of law.*"

The court went on to say that no riparian rights could

have been acquired under the territorial law in excess of those later granted by state law. The court said:

> "We should be slow to believe that a state beginning its organized life with an express adoption of the common law of England stood any differently from one where the common law was assumed to prevail because the citizens were of English descent. Therefore, when the Supreme Court of Kansas regards the principle of the common law to be that the fact of navigability, not the specific test of navigability convenient for England, is what excludes riparian ownership of riverbeds, *it is impossible for us to say that the territorial statute even purports to give greater rights.*"

The riparian owners then contended that if navigability in fact were to be considered the test in Kansas, the riparian owners were entitled to a jury trial, so as to determine by the evidence whether the Kansas river was navigable in fact.

The Supreme Court also overruled this contention in the following expressive language of Justice HOLMES which seems to contain the gist of the decision:

> "Then it was said, if navigability in fact is the test, the plaintiffs in error were entitled to go to a jury on that fact as it was in 1860, the date of the original grant, and the Supreme Court of the state was not entitled to take judicial notice that the river was navigable at Topeka. But there is no constitutional right to trial by jury in such a case, and if a state court takes upon itself to know without evidence whether the principal river of the state is navigable at the capital of the state, we certainly cannot pronounce it error. *In this aspect it is a question of state law.* (Citing cases.) *The fact is of a kind that should be established once for all, not perpetually re-tried.*"

The Supreme Court did not deem it necessary to state the reason for the rule that territorial laws cannot be invoked to carry a riparian title to the center of the stream. However, the Kansas Court gave as its reason, for the rule, "That Kansas entered the Union upon an equal footing with the other states," and since the Supreme Court affirmed the decision of the state court, it must be assumed that it approved the state's reason for the rule.

The right to define the riparian titles of private owners within its boundaries is undoubtedly the prerogative of each state, but if the territorial government prior to statehood, were allowed to anticipate the authority of the state which is later to be created and were allowed to promulgate its own rule of property defining the rights of riparian owners, the territorial government would thereby fix and determine the riparian rights of all private owners within the future state, and the state would enter the Union deprived of such prerogative and of the control of the beds of its public waters.[40]

The above reasoning was confirmed in *Kansas* v. *Colorado*, 206 U. S. 49, in which this Court rejected a contention that the laws of the Territory of Colorado, enacted prior to statehood, gave the riparian owners a vested right in the common law principle of equal use of waters. This Court said:

> "In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into states. (Citations.) But

40. See Haight v. City of Keokuk, 4 Iowa 213, in which the court said: "Although no state may exist at the time of such a grant, as in this case, yet grants and sales made under such circumstances are to be construed as having a view to the future sovereignty which may or will arise, and so as not to impair its right when arisen." (This case was cited with approval in Barney v. Keokuk, 94 U. S. 342.)

when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states (citations), and Colorada, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation."

The Supreme Court, in *Coyle* v. *Smith*, 221 U. S. 559, held that since new states come into the Union with all of the powers of the original states, Congress could not fix the site of the state capital for the State of Oklahoma. The court said:

> "The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. *That one of the original thirteen states could now be shorn of such powers by an Act of Congress would not be for a moment entertained.*"

The court observed in that case that the same doctrine applied to the control of the states over their rivers and cited *Escanaba and L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, to the effect that:

> "Equality of constitutional right and power is the condition of all the states of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River."

The original states undoubtedly possessed the privilege which the State of Oklahoma is seeking in the present action and it would seem too plain for argument that territorial laws cannot be invoked to deprive any state of such privilege. The Supreme Court reached to the very roots of

our Federal system of government when it so held in *Wear* v. *Kansas.*

The decision in *Wear* v. *Kansas* was expressly affirmed in *Brewer-Elliott Oil and Gas Company* v. *United States,* 260 U. S. 77, 89, in the following language which we repeat for continuity:

> "In *Wear* v. *Kansas,* 245 U. S. 154, 72 L. ed. 214, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood, to land bordering on the Kansas river, without restriction, reservation, or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on the navigable stream did not convey the bed of the river. The United States, by its unrestricted patent, was properly taken to have assented to its construction according to local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a nonnavigable stream, was immaterial. In either view the result there would have been the same."

PROPOSITION 6.

***(a)* Under the authority of *Wear* v. *Kansas,* 245 U. S. 154, the Circuit Court of Appeals for the Tenth Circuit, and the United States District Court for the District of Kansas have upheld the title of the State of Kansas to the Arkansas River bed. *(b)* To deny the State of Oklahoma ownership of the bed of the same river under similar circumstances would violate the constitutional doctrine of equality of states and would deny these petitioners the equal protection of the laws.**

(a) *The Federal courts have upheld the title of the State*

of Kansas to the bed of the Arkansas River in the following cases:

Jackson-Walker Coal and Material Company v. *Hodges,* (U. S. D. C. Kan.) 283 Fed. 457:

"While, from a consideration of the proof taken and submitted in this case, and from that general knowledge common to all men, *there can be no possible doubt whatever the Arkansas River at the point in controversy in this case is not now, and has not, since its known history, been navigable in point of fact;* that is to say, the stream in its ordinary condition does not afford a channel for useful commerce, hence is not navigable within the meaning of Acts of Congress on that subject as defined in the *Montello,* 20 Wall. 430, 22 L. ed. 391; *Leovy* v. *United States,* 177 U. S. 621, 20 Sup. Ct. 797, 44 L. ed. 914; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136; *South Carolina* v. *Georgia,* 93 U. S. 4, 23 L ed. 782; *The Robert W. Parsons,* 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73, and many other cases. *However, from what has gone before, it must, I think be held, in this case, the navigability of the stream in point of fact is not the true test.* On the contrary, the true test is whether the Arkansas River at the *locus in quo* must be regarded as navigable under the local laws of the State of Kansas, as ordained and established for the purpose of the unvarying determination of the property rights of riparian owners along its course through the state. *That by the local property rule established in this state, once for all, the title to the bed of the Arkansas River within the state is vested in the state and not in the adjoining riparian owner."*

No appeal was taken from this decision.

Shore v. *Shell Petroleum Corporation,* (U. S. D. C. Kan.) 55 F. (2d) 696:

"The difficulty with the argument is that the Indians did not own the fee title, that plaintiffs did not

deraign their title from the Indians, *and that the question of navigability in fact is not the true test with which we are confronted.* It appears to be well settled that where the litigation over the property rights is *between private parties, the local law regarding navigability controls,* and so the question here is not whether the Arkansas River in Kansas was navigable in fact prior to the issuance of the patents to the riparian owners, but whether under the law and public policy of the state it was deemed to be navigable."

The above decision was affirmed by the United States Circuit Court of Appeals for the Tenth Circuit, 60 F. (2d) 1, in the following language:

> "In *Wear* v. *Kansas,* 245 U. S. 154, 38 S. Ct. 55, 62 L. ed. 214, Ann. Cas. 1918B, 586, it was held that, if a state court takes upon itself to know without evidence whether a river is navigable, a Federal court cannot say it erred. And in *Donnelly* v. *United States,* 228 U. S. 243, 262, 33 S. Ct. 449, 455, 57 L. ed. 820, Ann. Cas. 1913E, 710, the court said:
>
> > 'But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states.'
>
> "See, also, *Jackson-Walker Coal & Material Co.* v. *Hodge,* (D. C.) 283 F. 457. *So we apply in this case the rule of property established by the Supreme Court of Kansas."*

Certiorari was denied in this case, 287 U. S. 656.

(b) *To deny the State of Oklahoma ownership of the bed of the same river under similar circumstances would violate the constitutional doctrine of equality of states.*

This "doctrine of the equality of the States" has been confirmed by the Supreme Court on numerous occasions.

In *Escanaba Transportation Company* v. *Chicago*, 107 U. S. 688, the court held that the limitations upon the territories northwest of the Ohio River, as contained in the Ordinance of 1787, ceased to have any operation or effect upon the State of Illinois or upon any of the other states carved out of such territory, upon their admission as states. The court said:

> "Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, *it ceased to have any operative force, except as voluntarily adopted by her after she became a state of the Union. On her admission she at once became entitled to and possessed all of the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted only on the same footing with them.* The language of the Act of Admission is 'on an equal footing with the original states in all respects whatever.' 3 Stat. at L. 536. '*Equality of constitutional right and power is the condition of all the States of the Union, old and new*'." (Quoted with approval in *Cardwell* v. *American River Bridge Co.*, 113 U. S. 210; *Huse* v. *Glover*, 119 U. S. 546, and *Ware* v. *Race Horse*, 163 U. S. 513.)

The court further said in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 9:

> "On the admission of any such new state, it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them."

The same rule was stated in *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 434, as follows:

> "*There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and*

exercise over persons and subjects within their respective limits."

The language in this opinion is applicable to the situation of the States of Oklahoma and Kansas with reference to the Arkansas River. As the court said, there can be no distinction between these two states in the "character of the jurisdiction, sovereignty, and dominion which they may possess and exercise" over the title of the riparian owners to the bed of the Arkansas River, these being "persons and subjects within their respective limits."

The court further said, in *Bolln* v. *Nebraska*, 176 U. S. 89:

"The idea that one state is debarred, while the others are granted the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution that it cannot be entertained even if Congress had power to make such discriminations."

This language is also applicable to the case at bar, for it may be here said with equal effect that the idea that the State of Oklahoma may be debarred from the privilege of determining the title to the bed of the Arkansas River, as between the state and private riparian owners, while the State of Kansas is granted such privilege, "is so repugnant to the theory of their equality under the Constitution that it cannot be entertained even if Congress had the power to make such discrimination."

The most complete statement of the doctrine of the equality of states is found in *Coyle* v. *Smith*, 291 U. S. 589. The Federal Enabling Act by which Oklahoma was admitted as a state contained a provision that the capital of the state should remain at Guthrie until 1913. The State Legislature, however, enacted a statute in 1910 providing for

the immediate removal of the capital from Guthrie to Oklahoma City. The Supreme Court held that the location of the state capital was entirely within the sovereign powers of the state and that the Federal Act had no binding force or effect whatever upon the State of Oklahoma.

The Court, in its discussion of the doctrine of equality of states, said:

> "The definition of 'a state' is found in the powers possessed by the original states which adopted the Constitution—a definition emphasized by the terms employed in all subsequent Acts of Congress admitting new states into the Union. The first two states admitted into the Union were the States of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. *Each act declares that the state is admitted 'as a new and entire member of the United States of America.'* Stat. at L. 191, 189, Chap. 7, 4. Emphatic and significant as is the phrase, 'admitted as an entire member,' even stronger was the declaration upon the admission in 1796 of Tennessee (1 Stat. at L. 491, Chap. 47) as the third new state, it being declared to be 'one of the United States of America,' 'on an equal footing with the original states in all respects whatsoever'—phraseology which has ever since been substantially followed in admission acts, *concluding with the Oklahoma Act, which declares that Oklahoma shall be admitted 'on an equal footing with the original states'.*"

The Oklahoma rule of property expressed in *State* v. *Nolegs*, 40 Okl. 479, is identical with that by which the State of Kansas acquired title to the same river, and was promulgated only two years after the Kansas decision. The people of Oklahoma, moreover, are motivated by the same desire that the river bed should serve the public as were the people of Kansas and the royalties derived from the

lease in this case, being the property of the common school fund of this state, will provide education for the school children of Oklahoma. It would be difficult for Oklahoma to understand why its people should be deprived of such benefits in face of the fact that similar benefits have been judicially awarded to her sister state.

The procedure adopted by the State of Kansas to successfully assert title to the Arkansas River was based upon constitutional principles approved by this court, and we most earnestly plead that to deny the State of Oklahoma the ownership of the bed of the same river under identical procedure and circumstances, would violate the constitutional doctrine of equality of states, and would be so inequitable as to offend every principle of natural justice.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES,
October Term, 1946.

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA.

APPLICATION FOR PERMISSION TO FILE SUPPLEMENTAL MEMORANDUM.

Come now, the petitioners, the State of Oklahoma, and the Champlin Refining Company, and respectfully ask leave to file supplemental memorandum in the above entitled cause, presented herewith and hereto attached, and in support of such application, state:

That by reason of the importance of the public interest in the petitioner's cause, and that justice may be done, this application for permission to file supplemental memorandum should be allowed, in order that the questions of the members of the Court, upon oral argument, may be more fully answered and that the controlling decisions of this Court, which were not there noticed, may be noticed.

That said supplemental memorandum includes a discussion of,

(1) The effect of the failure of the United States to timely assert sovereign title to the river bed in controversy;

(2) What is really at stake in this case;

(3) The Federal question concerning which inquiry was made by Mr. Justice REED;

(4) The assertion by Government counsel that the Federal allotment patents involved in the case of *Oklahoma* v. *Texas*, 258 U. S. 574, did not expressly cover any portion of the river bed;

(5) The assertion by Government counsel that Oklahoma has departed from the rule of *State* v. *Nolegs;* and,

(6) The position of the State of Oklahoma with reference to the stipulation (R., p. 34) concerning which Mr. Justice FRANKFURTER made inquiry, and the stipulation (R., p. 45) concerning which Mr. Chief Justice VINSON made certain observations.

That this application is not made for delay and counsel aver that petitioner's rights will be jeopardized in the event such application be denied.

Wherefore, petitioners pray that said application be allowed.

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J. WALKER FIELD,
Assistant Attorney General for the State of Oklahoma;

L. L. CORN,
Counsel for the Commissioners of the Land Office of the State of Oklahoma;

HARRY O. GLASSER,

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E. S. CHAMPLIN,
Attorneys for Champlin Refining Company.

SUPREME COURT OF THE UNITED STATES,
October Term, 1946.

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA.

SUPPLEMENTAL MEMORANDUM.

I.

The Effect of the Failure of the United States to Timely Assert Sovereign Title to the River Bed in Controversy.

A complete answer to this question is found in the opinion of this Court in *Marshall Dental Mfg. Company* v. *Iowa*, 226 U. S. 460. In that case, the contest was wholly between the State of Iowa and private claimants, exactly as in the case at bar.

The Court, speaking through Mr. Justice HOLMES, held that it was unnecessary to decide whether the United States or the State of Iowa held superior title, because in any event the private riparian claimants were without title and that the State of Iowa "by virtue of its sovereignty" had sufficient interest in the bed of the water to enable it to resist the claim of the private riparian owners.

The pertinent language of the Court is as follows:

"By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of

the adjoining lake. (Citing cases.) *It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the state.*

"The question as to the title to the bed is treated as open in *Hardin* v. *Shedd,* 190 U. S. 508, 519, • • • and *Whitaker* v. *McBride,* 197 U. S. 510, 515, • • • and there is not need to decide it now. It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake *sufficient to entitle it to maintain this suit against an intruder without title, whether the state owns the bed or not. The principle has been affirmed and acted on by the court so recently that it does not require further argument here.*"

The situation in the above cited case is identical with the case at bar and sustains the State's position unquestionably as against the claims of the Indian riparian owners.

The *Marshall Dental Mfg. Company* case is one of a trilogy of opinions written by Mr. Justice Holmes on this subject, the others being *Hardin* v. *Shedd,* 190 U. S. 508, and *Wear* v. *Kansas,* 245 U. S. 154. These cases reflect an underlying philosophy, *viz.,* that the beds of rivers which have not been conveyed to private persons, but which have remained a part of the public domain, should be preserved for the public benefit, whether navigable or non-navigable, and that if the United States does not elect to assert title to the bed in its sovereign capacity, then the title passes to the state as trustee for the public.

By this judicial interpretation, the beds of public waters are reserved for the public benefit through the trusteeship of the state—public property which would otherwise pass into private hands if it were not for the state's intervention.

In *Hardin* v. *Shedd,* the Court concludes that in the case of navigable rivers, the title passes to the state by virtue of its admission as a state, but in the case of the non-navigable stream, the title passes to the state by the process of excluding the private riparian owner.

In *Wear* v. *Kansas,* this interpretation was applied to preserve the title of the bed of the Kansas River to the public through the trusteeship of the State of Kansas, a public property which would have otherwise passed into private hands inasmuch as the Kansas River is concededly non-navigable.

Twenty years after the opinion in *Hardin* v. *Shedd,* that opinion was expressly affirmed by this Court in *Brewer-Elliott Oil & Gas Company* v. *United States,* 260 U. S. 77. Chief Justice TAFT, speaking for the Court in the opinion, adopted the reasoning of Mr. Justice HOLMES in the *Hardin* v. *Shedd* case, when he approved the practice of the states in retaining title to the beds of streams by recognizing them as navigable "when they are not actually so." The Court there approved this procedure as being a "convenient method of preserving (the states') control."

The prerogative of the states is not enlarged by the doctrine of these cases, because it is the right of the states to exclude private owners *by a direct rule of exclusion,* from the beds of waters which have remained part of the public domain.

For example, in *Hardin* v. *Jordan,* 140 U. S. 371, the Court noted that some of the thirteen original states retained title to the beds of certain public waters by an express law that the title of riparian owners should stop at the edge of such waters. These laws made no mention of navigability or non-navigability and it may therefore be

concluded that the right of Oklahoma to exclude private claimants from ownership of the bed of the Arkansas River does not depend upon it being navigable either in fact or in law.

Supporting this conclusion, we quote from *Brewer-Elliott Oil and Gas Company* v. *United States*, as follows:

> "* * * Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, *or by expressly denying a riparian title to the bed of a non-navigable stream*, was immaterial. In either view the result there would have been the same."

The emphasis in the oral argument upon navigability or non-navigability in view of the admitted fact that this litigation is wholly between private claimants and the State of Oklahoma, is wholly beside the point.

Furthermore, it must be remembered that if the Indian claimants are successful in this litigation in sustaining the position which they now hold, the public will entirely lose all right in the Arkansas River bed, as well as all other similarly owned river beds in Oklahoma and Kansas and such result will be in complete derogation of the interpretation of Mr. Justice Holmes in the cases just referred to. Such reversal of policy would come at a most inopportune time, in that it would mean that the bed of the Arkansas River is public property in Kansas, but as soon as the Oklahoma state line is reached, it becomes private property within that State.

Such far-reaching action should not be taken unless this Court is prepared to overrule Mr. Justice Holmes' cited opinions, as well as the principles of the many other cases cited in our brief and thereby over-turn the long-

established property rights which have come to be fully recognized in the states as they have entered the Union.

The United States, having failed to assert a sovereign claim to the river bed on July 13, 1943, when the complaint was filed in this cause, is now out definitely and the inquiries by Mr. Justice FRANKFURTER in these particulars but serve to clearly reveal that the present activity of the United States is but the activity of an ordinary trustee—not a sovereign trustee as denominated by Government counsel —engaged in asserting a private claim upon behalf of its wards, which we say is contrary to the public interest of the people of the State of Oklahoma.

The United States may conclude to abandon any interest which the public may have in these river beds, but the State of Oklahoma feels differently about the matter and is not to be catechized for doing so.

It is true that oil lies at the foundation of this law suit—and surely the public's superior interest in such valuable production against the claims of private owners, Indians or otherwise, should be safeguarded by the State and such has always been the public policy of the states of Kansas and Oklahoma.

Mr. Chief Justice TAFT understood the problem fully and but for the conveyance to the Osages of the north half of the Arkansas River bed at the very point here in controversy prior to statehood by the Federal Government, the judgment in the *Brewer-Elliott* case would have been for the State.

The State of Oklahoma bowed to the reasoning of that decision. That very reasoning, however, now sustains the claim of the State of Oklahoma to the south half of that same river bed and upon that reasoning the State relies.

II.

What Is Really at Stake in This Case?

This question by Mr. Justice JACKSON deserves an answer which must be largely outside the record.

The segments of the river bed opposite the four Indian allotments here in controversy, have been proved to be worthless in so far as the production of oil or gas may be concerned. Most of the river lots in the area have been sold by the Indians to white people and the only segments of the river bed which are now producing oil and gas are opposite the lands of such white people and their oil lessees. The title to such producing segments of the river bed are in issue in the cases now before the Supreme Court of the State of Oklahoma referred to on page 15 of the brief of petitioners.

If the Oklahoma Supreme Court be required to adopt the Government's theory of this case, then one of those producing segments of the river bed will become the property of a private family in California named Swearingen, and the other will become the property of a private family in Oklahoma named Oldham and their grantees. The oil leases upon these producing segments of the river bed will become the property of the Alladin Petroleum Corporation, a Corporation, and Phillips Petroleum Company, a Corporation, and their various assignees, and the royalties will be payable to the private families and their grantees above named.

Such facts certainly do not furnish a very inspiring reason for overturning the doctrine by which this Court, speaking through Mr. Justice HOLMES, adopted a judicial interpretation wholly designed to enable the states to preserve the beds of such rivers in the public.

III.

Does the Case Involve a Federal Question?

This inquiry by Mr. Justice REED requires further answer.

It is undoubtedly true, as this Court states in *United States* v. *Oregon*, 295 U. S. 2, and in *United States* v. *Holt State Bank*, 270 U. S. 55, that navigability presents a Federal question.

However, this statement is not determinative of the matter because this Court made it clear in *United States* v. *Oregon* that even though navigability is a Federal question, the United States has assented that the state law of navigability will still govern in all cases in which the United States is not, or its express grantees are not, asserting title. Therefore, as between a state and private claimants, the state law becomes the Federal law by the settled and long-recognized rule of assent and adoption of the United States.

Thus is harmonized the doctrine expressed in *Wear* v. *Kansas* and the long line of decisions cited in petitioner's brief at pp. 36-42 incl., with cases like *Brewer-Elliott Oil & Gas Company* v. *United States* and *United States* v. *Oregon*, in which this court declined to apply the state law in cases in which the United States or its express grantees were asserting title. The latter line of cases is the exception to the general rule and must be read accordingly.

The portion of the opinion in *United States* v. *Oregon* (295 U. S., at p. 28) that supports the above conclusion, reads as follows:

> "The construction of grants by the United States is a Federal, not a state, question (citing cases), and involves the consideration of state questions only in so far *as it may be determined as a matter of Federal law*

that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances (citing cases). In construing a conveyance by the United States of land within a state, *the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.*"

IV.

The assertion by Government counsel that the Federal allotment patents involved in the case of *Oklahoma* v. *Texas*, 258 U. S. 574, did not expressly cover any portion of the river bed.

This statement requires considerable clarification.

The United States in 1867 *expressly granted* the north half of the Red River bed to the "middle of the main channel" to the Comanche, Apache and Kiowa tribes and such portion of the river bed therefore became a part of tribal lands. This 1867 grant to the "middle of the main channel" lost the *Red River* case to the State of Oklahoma. Certainly no such grant to the south half of the Arkansas River bed is in the present case.

In 1900 Congress authorized the Red River tribal lands to be divided in severalty and upon authority of that act, the Federal allotment patents were issued to the individual members of the tribe.

While it is true that these individual patents did not expressly cover the river bed, it is also true that the north half of the river bed was no longer public domain by reason of the prior express grant to the tribes in 1867. This is the reason and the only reason, that this Court declined to apply the Oklahoma rule of property in that case.

Government counsel intimated that this Court intended to reverse *Wear* v. *Kansas* by its decision in *Oklahoma* v. *Texas*. This cannot be true, *first*, because that decision was handed down within a few months of the decision in *Brewer-Elliott Oil and Gas Company* v. *United States*, and in the latter decision *Wear* v. *Kansas* was expressly recognized; and, *secondly*, in *Oklahoma* v. *Texas*, this Court reiterated the general rule that the state law governs in all cases in which the United States has not attempted to retain or expressly convey river bed lands.

V.

The Assertion by Government Counsel that Oklahoma Has Departed From the Rule of *State* v. *Nolegs*.

That the above assertion is entirely unfounded, is shown by the facts, (*1*) that the case of *State* v. *Nolegs* has never been reversed or modified; (*2*) that it has been reinforced by a State statute (Okla. Stat. 1941, Title 64, Sec. 209); and (*3*) that in two recent cases the Supreme Court of Oklahoma has assumed that the title to the bed of the Arkansas River is in the state (*City of Tulsa* v. *Commissioners of the Land Office*, 101 P. (2d) 246; *City of Tulsa* v. *Peacock*, 74 P. (2d) 359).

The only portions of the Arkansas River bed to which the State of Oklahoma has relinquished title are those portions which were expressly conveyed to Indian tribes prior to statehood, to-wit, the south half of the river bed along the Osage reservation and the entire river bed through the original Creek grant.

The people of Oklahoma feel that they have already been severely penalized by these conveyances of its public streams, but they recognize that it was doubtless thought necessary and proper that such conveyances be made at

the time, and they further recognize that those portions of the beds of its rivers which were thus conveyed to Indian Tribes and which have now become the property of private individuals, are lost both to the State and to the United States beyond recall. Oklahoma, however, did not give up those portions of its river beds without a struggle. It is true (as the Government states in its brief) that Oklahoma has three times attempted to assert title to the beds of rivers which were expressly granted by the Federal Government to Indian Tribes prior to statehood.

In *Brewer-Elliott Oil & Gas Company* v. *United States*, 260 U. S. 77, it attempted to assert title to the north half of the bed of the Arkansas River which had been expressly granted to the Osages prior to statehood.

In *United States* v. *Hayes*, 20 F. (2d) 873, it attempted to assert title to that portion of the bed of the Arkansas River which had expressly been granted to the Creek tribe prior to statehood.

In *Oklahoma* v. *Texas*, 258 U. S. 547, it attempted to assert title to the bed of the Red River, the north half of which had been expressly granted to the Comanche and Apache Tribes prior to statehood, while the south half of which had been expressly reserved by the United States in its sovereign capacity.

In all of those cases, the claim of the State of Oklahoma was defeated, not because this Court had deviated from the rule in *Wear* v. *Kansas*, but merely because the portions of the river beds involved in those cases had been either expressly conveyed to Indian Tribes prior to statehood or had been reserved by the United States in its sovereign capacity.

The present case, however, goes far beyond the cases above cited. The portion of the river bed involved in this

action was never the property of the Indians who are the claimants in this action and was never the tribal property of the tribes to which they belong. Furthermore, the United States is not claiming the river bed for itself.

Hence, the status of the portion of the river bed involved in the present action is exactly the same as the status of the bed of this same Arkansas River within the State of Kansas, the title to which has been judicially awarded to the State of Kansas by this Court.

The State of Oklahoma in this action is merely attempting to preserve for its people the same rights to the remaining portions of its public river beds, which the State of Kansas and its other sister states have received (as a matter of course) in *all* of their public rivers.

VI.

The position of the State of Oklahoma with reference to the stipulation (R., p. 34) concerning which Mr. Justice Frankfurter made inquiry; and the stipulation (R., p. 45) concerning which Mr. Chief Justice Vinson made certain observations.

The stipulation at page 34 of the record was entered into at the request of the Government.

It was the intention of the parties that if the Indian claimants should be unsuccessful in the present action, the United States might later bring suit to assert title in its sovereign capacity without being met by a plea of *res adjudicata*. It should in this connection be observed that if the Indian claimants be successful, then the United States, as well as the State of Oklahoma, will be without the right to claim any interest in such river bed.

For the State's position, if future litigation should arise between the State and the United States in its sov-

ereign capacity, we wish to say that the State recognizes that if the United States in its sovereign capacity had made timely claim to the bed of the Arkansas River here in controversy, such claim upon the authority of *United States* v. *Oregon* would have been well founded. However, that same case shows that the Federal Government may abandon title to a river bed, and it would be the position of the State of Oklahoma, if such future litigation should arise, that the United States has abandoned any claim of title to the river bed here in controversy.

As to the stipulation (R., p. 45) the parties were merely seeking to avoid the accumulation of evidence upon a proposition which was deemed not material as a matter of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 163–173) is reported at 156 F. 2d 769.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 29, 1946 (R. 173). A petition for rehearing, filed on August 17, 1946, was denied on August 29, 1946 (R. 193). The petition for a writ of certiorari was filed on November 25, 1946. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether trust patents, issued by the United States to certain Indian wards and describing by metes and bounds tracts of land riparian to a non-navigable stream, included the bed of the stream when a statute of the Oklahoma Territory, applicable when the patents were made, adopted the common-law rule that a conveyance of riparian lands bordering upon a non-navigable stream carried title to the bed of the stream.

2. If so, whether such title, held as trustee for the Indian allottees, was subsequently divested out of the United States and appropriated by the State of Oklahoma, by virtue of a determination by the State Supreme Court, years after the patents issued and after the admission of Oklahoma to the Union in a case to which neither the United States nor its allottees were parties, that the stream was navigable; or whether such title was appropriated by the State by means of a State statute, passed in 1919, asserting title to the beds of streams over two chains in width.

STATUTES INVOLVED

Sec. 4173, St. 1890, enacted by the legislature for Oklahoma Territory, reads:

> * * * In all cases where the opposite banks of any streams not navigable belong

> to different persons, the stream and the bed thereof shall become common to both.

The Act of March 28, 1919, 64 Okla. Stat. Ann. sec. 290, provides:

> The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared the property of the State of Oklahoma. (Laws 1919, ch. 206, p. 293, § 1.)

STATEMENT

Prior to the admission of Oklahoma to the Union, the United States issued trust patents to certain of its Indian wards under which it held title for the Indian allottees to four riparian tracts on the south shore of the Arkansas River in Oklahoma. The judgment sought to be reviewed adjudicates that the United States also has title, in trust for the allottees under such trust patents, to those portions of the river bed which abut the riparian tracts, extending to the thread of the river. The riparian tracts are in color on the map at R. 35.

The land on both sides of the Arkansas River at the location in question was first surveyed into sections, townships, and ranges in September, 1872 (Fdg. VI, R. 69, Def't's Exs. 7 and 8, Orig.). In 1893, 1906, and 1907, the United States issued four trust patents to certain Pawnee and

Otoe Indians.[1] These patents neither included nor excluded the adjoining river bed and simply described the parcels by survey descriptions. (R. 67–68, 69, 114–120.)

On July 20, 1942, the State of Oklahoma executed two oil and gas leases in favor of petitioner Champlin Refining Company, covering the south half of the Arkansas River bed for a considerable distance including the area adjoining the four Indian allotments already described, and the Champlin Refining Company has drilled one well which is producing in commercial quantities (Fdg. X, R. 70; Pltf's Exs. A and B, R. 14–20).

On July 13, 1943, the United States began the instant proceeding by filing its complaint against the Champlin Refining Company, a New Mexico corporation (R. 1–13). In that petition the Government pleaded the various grants, reservations, conveyances, and allotments. It was further alleged that under the lands held in trust by the United States for its allottees or their heirs, there were valuable mineral deposits consisting of oil and gas, and that the State of Oklahoma had

[1] Under a treaty with the Cherokee Nation in 1866, it was agreed that friendly Indians might be settled on these lands (R. 65–66). The Otoe and Missouria Indians were assigned a portion of the lands and in 1883 the Cherokee Nation conveyed such portion to the United States in trust for the Otoes and Missourias (R. 66, 129–133). Similarly, a portion of the lands was set aside for the Pawnee Indians, and the Cherokees conveyed title thereto to the United States (R. 67, 122–127).

no proprietary title or interest in the bed of the Arkansas River and was without power to confer, by lease or otherwise, any title or interest in those portions of the river bed adjoining the allotments. The complaint prayed that the Champlin Company be enjoined from trespassing upon the river bed and drilling for minerals thereunder, that the leases be cancelled, that the Champlin Company be enjoined from asserting any title to the river bed and that title be quieted in the United States, its allottees and the heirs of deceased allottees.

On August 5, 1943, the Champlin Refining Company filed an answer (R. 22–23) and the State of Oklahoma subsequently filed an answer (R. 26–28), the State having been granted leave to intervene by order of August 20, 1943 (R. 23–25). The answers of these two parties, as amended (R. 28–29, R. 29–30), admitted execution of the oil and gas leases but alleged, in effect, that the State of Oklahoma was the owner of the river bed included in the leases because the river bed became the property of the State upon its admission to the Union.

On December 21, 1944, the trial court filed its findings of fact and conclusions of law (R. 65–75). In addition to the findings already noted, the court found that in all of the reservations, grants, and conveyances, the bed of the river was neither expressly included nor excluded (Fdg. V),

and that "the Arkansas River, at the points in question in this litigation and at all times herein material, is not navigable in fact" (Fdg. VII). The court concluded that the State had power to declare rivers navigable and that the decision of the Supreme Court of Oklahoma in 1914, *State* v. *Nolegs,* 40 Okla. 479, 139 Pac. 943, wherein it was held that the river was navigable, controlled the court's decision in the instant case; that the State was owner of the bed at the points in issue; and that the United States had no title to the bed of the river. A judgment to this effect was entered (R. 75–76), from which the Government appealed (R. 76).

Upon appeal, the circuit court of appeals, relying upon decisions of this Court, held (R. 168–173) that the question of navigability was a federal question, that under the federal rule non-navigability in fact is non-navigability in law, and that the State of Oklahoma could not adopt a retroactive rule which would destroy a title already accrued under federal law and grant, or would enlarge what passed to Oklahoma at the time of her admission to the Union. The court further held that at the time the trust patents were issued, the common-law rule prevailed in Oklahoma Territory and that the grants of riparian tracts carried with them title to the river bed. Accordingly, the circuit court of appeals reversed the judgment of the trial court (R. 173).

ARGUMENT

1. "The Arkansas River, at the points here in issue and at all times herein material, is not navigable in fact." (R. 69). Petitioners concede this (Pet. 2).[2] The trust patents neither expressly included nor excluded the bed of the river (R. 69). The rule for construction of such grants was declared by this Court in *Oklahoma* v. *Texas,* 258 U. S. 574, 594–595, to be that "if its intention be not otherwise shown, it [the United States] will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies." Local law does not apply as such, but rather as an "obvious guide" to the intention of the United States. *United States* v. *Oregon,* 295 U. S. 1, 28. Since the patents here in question were issued prior to Oklahoma's admission to the Union, clearly the local law furnishing the "obvious guide" is the law in force in the Oklahoma Territory. Cf. *United States* v. *Elliott,* 131 F. 2d 720, 723 (C. C. A. 10). Section 4173, St. 1890, of the Territorial Statutes (*supra,* pp. 2–3) put in force the common-law rule under which title to the bed of the stream to the center thereof passes

[2] It had already been determined to be non-navigable above its confluence with the Grand River (which includes the portion of the river here in question) in litigation between the United States and the State of Oklahoma. *United States* v. *Brewer-Elliott Oil & Gas Co.*, 249 Fed. 609 (W. D. Okla.), affirmed, 270 Fed. 100 (C. C. A. 8), 260 U. S. 77.

with a grant of the shore land. Cf. *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 289.[3] Accordingly, the court below, relying upon the rule enunciated by this Court in *Oklahoma* v. *Texas, supra,* held that, under the local law in force at the time the trust patents were issued, title to the bed of the river passed with the grant of the shore land.

The decision of this Court in *Oklahoma* v. *Texas, supra,* is on all fours. There the Government litigated with the State of Oklahoma title to the bed of the Red River. While the United States claimed the south half of the bed for itself, its claim to portions of the north half of the river bed was interposed, as is the case here, in behalf of Indian allottees to whom it had granted trust patents covering riparian allotments on the north bank. There, as here, the lands were surveyed and the river meandered, but the township and section lines were not extended across the river (258 U. S. 585), and the disposals were made according to the legal subdivision established by the official survey of the upland (258 U. S. 595). The only difference between that case and this one is that there the trust patents were issued in 1909 and 1910 (258

[3] The law adopted by the State of Oklahoma upon its admission to the Union is irrelevant. However, the common-law rule was likewise adopted by the State. *Oklahoma* v. *Texas*, 258 U. S. 574, 596; *Hale* v. *Record*, 44 Okla. 803, 146 Pac. 587; *Anderson-Pritchard Oil Corp.* v. *Key Okla Oil Co.*, 149 Okla. 262, 299 Pac. 850; *Hunzicker* v. *Kleeden*, 161 Okla. 102, 17 P. 2d 384.

U. S. 596), which was after Oklahoma became a state, while here the patents issued prior to Oklahoma's admission to the Union. This Court there held that, since it found the river to be nonnavigable in fact, and since the common-law rule prevailed in Oklahoma when the trust patents issued, title to the north half of the river bed passed with the grant of the shore tracts.[4] So here, the river being found by the courts below, and conceded by petitioners, to be nonnavigable in fact, title to the portions of the south half of the river bed passed with the grant of the shore land under the trust patents.

Petitioners' attempted distinction of *Oklahoma* v. *Texas* (Pet. 40) is invalid. The fact that in previously setting up a tribal reservation, the Government had bounded it by the main channel of the river was merely one of the historical circumstances which led this Court to conclude that the United States intended to grant the north half of the river bed as an incident to grants of land on the north bank of the river.[5] But the Court also based its decision on the alternative and entirely independent ground that the

[4] Thus, even if the law of Oklahoma were relevant, title to the river bed vested under the trust patents by Oklahoma law prior to the *Nolegs* decision upon which petitioners rely (Pet. 2, 41).

[5] The United States contended in the instant case that the historical circumstances showed a similar intent on the part of the Government. The circuit court of appeals did not find it necessary to pass on this contention.

trust patents alone had the same effect under the common-law rule in force in Oklahoma at the time of the grants.

2. In their Proposition 1 (Pet. 16–30), petitioners argue, without cited authority, that title to the river bed remained in the Cherokee Nation until 1891 when, they say, it became part of the public domain of the United States. While this argument is unsound, and title to the river bed could be shown to have passed under the deeds to the United States in trust for the tribes, it need not be pursued here. Petitioners do not show what difference it would make in construing the trust patents in question. The rule is the same whether the Government is disposing of public lands or tribal lands. *Oklahoma* v. *Texas,* 258 U. S. 574, 594, 595. Moreover, in grants of riparian public lands on non-navigable streams, it has long been the general policy of the United States not to withhold the beds of the streams. *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 87; R. S. 2476, 43 U. S. C. 931.

Petitioners' second proposition (Pet. 30–34), that reference is made to local law in determining whether the bed passes is agreed to in principle. But under the local law here applicable (*supra,* pp. 7–8) title to the bed passes under the trust patents.

In petitioners' Proposition 3 (Pet. 34–41) they assert that the decision of the Supreme Court

of Oklahoma in 1914, in the case of *State* v. *Nolegs,* 40 Okla. 479, 139 Pac. 943, in which it was held that the Arkansas River was navigable in Oklahoma, fixes the character of the river in law and that by reason of such judicial determination title passed to the State. Oklahoma does not claim under any express grant and accordingly relies upon the principle of equality of States (Pet. 6, Ans. Par. 13, R. 26–27). That principle, however, means only that, upon admission to the Union, a State acquires the beds of navigable rivers. *Oklahoma* v. *Texas,* 258 U. S. 574, 583; *United States* v. *Utah,* 283 U. S. 64, 75. Since the claim of the State under this principle is an assertion of a federal right, and since the effect upon title to such lands is the result of federal action in admitting a State to the Union, the question of navigability is a federal, not a local question. *United States* v. *Holt Bank,* 270 U. S. 49, 54, 55; *United States* v. *Oregon,* 295 U. S. 1, 14. It is the settled federal rule that "navigability in fact is the test of navigability in law." *Oklahoma* v. *Texas,* 258 U. S. 574, 586. See also *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 86.

The cases cited (Pet. 34–41) do not support the argument that the State can acquire title to the bed of a river concededly nonnavigable in fact simply by declaring the river navigable. This Court has held that State law cannot operate, at

least retroactively, to convert a federal grant of shore lands to third parties into a conveyance of the river bed to the State. *United States* v. *Oregon*, 295 U. S. 1, 28, and in the cases of *Oklahoma* v. *Texas*, *supra*, and *Brewer Oil Co.* v. *United States*, *supra*, and *Brewer Oil Co.* v. *United States*, *supra*, this Court specifically rejected petitioners' present contentions. In *Oklahoma* v. *Texas*, *supra*, Oklahoma relied upon a decision of the Oklahoma Supreme Court (*Hale* v. *Record*, 44 Okla. 803, 146 Pac. 587), holding that the Red River was navigable, as establishing the character of the river as such. This Court held that, since the United States was not a party to that litigation it was not bound by it, and, having found the river to be nonnavigable in fact, stated that "We conclude that no part of the river within Oklahoma is navigable and therefore that the title to the bed did not pass to the State on its admission into the Union. If the State has a lawful claim to any part of the bed, it is only such as may be incidental to its ownership of riparian lands on the northerly bank." (258 U. S. 591–592). Here, the river being nonnavigable in fact, and the State admittedly having no title to the shore lands, it likewise has no claim to the river bed.

Oklahoma for the second time advanced before this Court its present contention in *Brewer Oil Co.* v. *United States*, 260 U. S. 77. That case

involved title to the north half of the bed of the Arkansas River at the same point on the river here in question (R. 70). Oklahoma again asserted that navigability was a local question and that the navigable character of the Arkansas River had been settled by the Supreme Court of Oklahoma in the *Nolegs* case, the very decision now being relied upon by petitioners. Since the United States was not a party to the *Nolegs* litigation, this Court, in rejecting Oklahoma's contention, first cited its prior ruling on the point in *Oklahoma* v. *Texas, supra.* And since the federal grant to the Osage Nation there involved had been made prior to the admission of the State, as were the grants in the case at bar, Oklahoma's contention was rejected on the additional ground that the question was what title the Osages took in 1872 when the grant was made, thirty-five years before Oklahoma became a State, and that navigability was not a local question for the state tribunals to settle; that if before Oklahoma became a State the Osages had acquired title, there was nothing in the principle of equality of States permitting a divesting of the title; and that a State could not "adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here in-

voked" (260 U. S. at 87, 88). That holding applies with equal force here, since the trust patents were issued prior to Oklahoma's admission to the Union.

Under Proposition 4 (Pet. 41), petitioners assert that the *Nolegs* decision, as reinforced by an Oklahoma statute, has established a rule of property. The rule of property is to the contrary. The *Nolegs* decision has not been regarded as sound since this Court rejected it in 1922 in the *Brewer Oil Co.* case. The Supreme Court of Oklahoma acknowledged as much in 1932. *Vickery* v. *Yahola Sand & Gravel Co.,* 158 Okla. 120, 12 P. 2d 881, 882. And in *Law of Oil and Gas Leases,* Glassmire (1938 ed.) at p. 265, it is noted that much litigation over the beds of the Arkansas, Red, Cimarron and Canadian Rivers during the preceding fifteen years had been finally determined against the State and in favor of the riparian owners, "the Oklahoma courts having taken judicial notice that such streams, and tributaries thereof, were not navigable in fact." Glassmire also stated (p. 265), after citing the *Brewer-Elliott* litigation, that "Under this general rule of non-navigability in fact the bed of the Arkansas River in the Cherokee and Creek Nations also belongs to the present riparian owners."

The statute relied upon by petitioners (Pet. 41) as "reinforcing" the *Nolegs* decision, 64 O. S. A. 1937, sec. 290, is quoted *supra,* p. 3. It author-

izes the Commissioners of the Land Office to lease for oil and gas purposes all lands between mean and high water mark in all streams or rivers of two chains or over, and all such streams are declared the property of the State of Oklahoma. It was enacted in 1919, twenty-six years after the first trust patents here involved issued and twelve years after the later trust patents issued. The statute does not deal in terms of navigability. But if applied, as petitioners seek to apply it, to the Arkansas River, which petitioners concede to be non-navigable in fact, then it stands on no different footing than a similar statute of the State of Oregon to which the State sought to give retroactive effect in the case of *United States* v. *Oregon,* 295 U. S. 1. In rejecting Oregon's contention, this Court, after observing that the statute was adopted subsequent to the grants of the United States there involved, stated that "the case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States" (295 U. S. 29).

There remains petitioners' Proposition 5 (Pet. 42–46), in which they attempt to show that the decision below, and necessarily the decision of this Court in *Oklahoma* v. *Texas,* 258 U. S. 574, is in conflict with the earlier decision of this Court in

Wear v. *Kansas*, 245 U. S. 154. It is sufficient to note, as did the circuit court of appeals (R. 172), that the *Wear* case did not present to this Court for review a judgment of the Supreme Court of Kansas which was based upon the view of the state court that, while acknowledging the river there in question to be non-navigable in fact, it nevertheless was holding it to be navigable in law. On the contrary, a reading of this Court's opinion shows that the state court had applied the federal rule of navigability in fact, and the only question passed upon by this Court which is remotely material here was the propriety of the state court's having found such fact by judicial notice. This Court simply held that, in the circumstances there present, consisting, among others, of prior decisions of the question by the state court, and a virtual concession of navigability in fact on the pleadings, it was not error so to determine the issue of navigability. Whatever the meaning of the gloss put upon the *Wear* decision in *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 89, with respect to the power of a state to conclusively determine the navigability of a stream "without regard to the fact," it is clear, under the *Brewer* decision itself, that such action cannot conclude a "right to the bed of the river, granted and vesting before statehood," and that such is the right of the respondent here. *Ibid.* Thus neither the decision below nor the decision of this

Court in *Oklahoma* v. *Texas, supra,* is in conflict with this Court's earlier decision in the *Wear* case.

CONCLUSION

It is submitted that the questions presented were properly decided by the circuit court of appeals, that its decision is in accord with decisions of this Court upon which the lower court relied, that no conflict of decision is shown, and that accordingly the petition for a writ of certiorari should be denied.

Respectfully,

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not write an opinion; that court's views are reflected in its conclusions of law at R. 62–67. The opinion of the circuit court of appeals (R. 141–150) is reported at 156 F. 2d 769.

JURISDICTION

The judgment of the circuit court of appeals (R. 150) was entered on July 29, 1946. A petition for rehearing was denied on August 29, 1946 (R. 151–161). The petition for a writ of certiorari was filed on November 25, 1946, and

was granted on January 20, 1947 (R. 161). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether a State, upon its admission into the Union, acquires title to the bed of a river within its borders which is admittedly nonnavigable in fact by virtue either (a) of a subsequent determination by a state court, made in a case to which neither the United States nor its riparian Indian allottees were parties, that the river is navigable, or (b) by a subsequent assertion of title to such river bed by the state legislature.

2. Whether trust patents issued to restricted Indian allottees before the creation and admission of a State into the Union, expressly conveying riparian lands bounded by a river nonnavigable in fact, but silent with respect to the river bed, also vested title to the bed, adjacent to the trust allotments, to the thread of the river, and, if so, whether such vested title of the United States and its riparian allottees could be divested by subsequent state judicial determination of navigability or legislative assertion of title.

STATUTES INVOLVED

Section 4173 of the Acts of the Oklahoma Territory of 1890 reads as follows:

> * * * In all cases, where the opposite banks of any streams not navigable belong

to different persons, the stream and the bed thereof shall become common to both.

The Act of the Oklahoma Legislature of May 28, 1919, 64 O. S. A. section 290, reads as follows:

> The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared the property of the State of Oklahoma.

STATEMENT

The judgment (R. 150) here being reviewed reversed the judgment of the trial court in favor of petitioners, State of Oklahoma and Champlin Refining Company (R. 67), and adjudged that the United States, under trust patents issued to Indian wards covering riparian tracts on the south bank of the Arkansas River in Oklahoma, also holds title to the south half of the river bed adjacent to the allotted riparian tracts in trust for its Indian wards. The facts are not in dispute.

The United States originally acquired title to the land in suit as a part of the Louisiana Purchase in 1803. Under treaties of May 6, 1828, 7 Stat. 311, February 14, 1833, 7 Stat. 414, and December 29, 1835, 7 Stat. 478, the United States conveyed to the Cherokee Nation, by deed of December 31, 1838, a large tract of land, including the land on both sides and the bed of the Arkansas

River at the locations in suit (Fdgs. III (a) and (b), R. 57; Deft.'s Ex. 1 C, R. 118–124). By treaty of July 19, 1866, 14 Stat. 799, the Cherokee Nation agreed that the United States might settle friendly Indians upon that part of the Cherokee lands known as the Cherokee Outlet. Article XVI of that treaty provided that such lands would be conveyed to the Indians so settled. (Fdg. III (c), R. 57–58.) This article covered Cherokee lands west of 96°, and therefore included the lands in question. By treaty of October 28, 1867, 15 Stat. 593, 594, a reservation was set aside for the Cheyenne and Arapahoe Indians between the Cimarron and Arkansas Rivers. This reservation, which embraced the lands here in suit, was expressly extended to the middle of the Arkansas River. The Cheyenne and Arapahoe Indians declined this reservation and relinquished their claim. H. R. Ex. Doc. No. 89, 47th Cong. 1st sess. (Fdg. III (d), R. 58).

On June 5, 1872, 17 Stat. 228, Congress authorized the Cherokee Nation to convey to the Osage Nation a tract of land described as:

> Bounded * * * on the south and west by the north line of the Creek Country and the main channel of the Arkansas River * * *.

(Fdg. III (e), R. 58). This grant included the land on the opposite side of the river at approximately the location of the tracts in question

(R. 62), and the title of the United States in trust for the Osage Nation to the north half of the river bed was upheld in subsequent litigation between the United States and the State of Oklahoma. *United States* v. *Brewer-Elliott Oil & Gas Co. et al.*, 249 Fed. 609 (W. D. Okla.), affirmed, 270 Fed. 100 (C. C. A. 8), affirmed, 260 U. S. 77.

The land on both sides of the Arkansas River at the location in question was first surveyed into sections, townships, and ranges in September 1872, the survey being approved on September 16, 1872 (Fdg. VI, R. 61, Deft.'s Exs. 7 and 8, not printed in the transcript of the record but on file in the office of the Clerk of this Court). Two of the riparian tracts involved are in Township 23 North, Range 4 East of the Indian Meridian (Fdg. IV (a) and (b), R. 59–60) and these tracts are held in trust for Pawnee Indians (Pltf.'s Exs. A and 2, R. 100–103). The other two tracts are located in Township 23 North, Range 3 East of the Indian Meridian (Fdg. IV (c) and (d), R. 60–61), and these tracts are held in trust for the Otoe Indians (Pltf.'s Exs. 3 and 4, R. 103–106). The history of the Otoe and Pawnee allotments is not the same and they, therefore, require separate notice.

With respect to the Otoe allotments, that history is as follows: Under the 1866 treaty with the Cherokees, and pursuant to authority contained in

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the Act of March 3, 1881, 21 Stat. 380, the Secretary of the Interior designated and assigned for the use and occupation of the Confederated Otoe and Missouria Tribes of Indians the following:

> that portion of Tp. 23, N. R. 3 E. lying west of the Arkansas River * * *

Other townships not here involved were also included (Fdg. III (f), R. 58; Pltf.'s Ex. 5, R. 106–107). Pursuant to the 1866 treaty with the Cherokees, and in conformity to the Act of March 3, 1883, 22 Stat. 603, 624, the Cherokee Nation, on June 14, 1883, conveyed to the United States in trust for the use and benefit of the Otoe and Missouria Indians:

> Fractional township twenty-three (23) North, range three (3) East of the Indian Meridian; lying and being on the right bank of the Arkansas River, according to a plat of said lands hereto annexed, marked "A", and made a part of this conveyance * * *.

The plat accompanying the deed shows this fractional township as bounded on the north by the Arkansas River. Other townships not here involved were also included (Fdg. III (g), R. 58–59; Pltf.'s Ex. 7, R. 111–114a). On November 24, 1906, a trust patent was issued to Ethel Lewis Barnes, an Indian of the Otoe and Missouria Tribes, covering the following described land:

> the South half and the North East quarter of the South East quarter and the Lot num-

> bered five of Section twenty-four, in Township twenty-three North of Range three East, of Indian Meridian in Oklahoma, containing one hundred and fifty-two acres and twenty hundredths of an acre.

Title to said tract is now held by the United States in trust for Ethel Lewis Barnes (Fdg. IV (c), R. 60; Pltf.'s Ex. 3, R. 103–104). On June 10, 1907, a trust patent was issued to Anna Robedeaux, an Indian of the Otoe and Missouria Tribes, covering the following described land:

> * * * Lot numbered six of Section twenty-four in Township twenty-three North of Range three East of the Indian Meridian in Oklahoma, * * *.

Title is now held by the United States in trust for ten named heirs of Anna Robedeaux (Fdg. IV (d), R. 60; Pltf.'s Ex. 4, R. 105–106). Both of these allotments are bounded by the Arkansas River, as shown by the plat at R. 32a.

With regard to the Pawnee allotments in Township 23 North, Range 4 East of the Indian Meridian, the following is the history:

By Section 4 of the Act of April 10, 1876, 19 Stat. 28, 29, there was set aside as a reservation for the Pawnee Tribe of Indians, in accordance with the 1866 treaty with the Cherokees, the following described land:

> All that tract of country between the Cinnarron [Cimmarron] and Arkansas Rivers embraced within the limits of townships

> * * * twenty-three, * * * of range four east, * * * of the Indian Meridian.

Other townships not here involved were included in the reservation (Fdg. III (h), R. 59).[1] In accordance with the 1866 treaty with the Cherokees and pursuant to the provisions of the Act of March 3, 1883 (22 Stat. 603, 624), the Cherokee Nation on June 14, 1883, conveyed to the United States in trust for the use and benefit of the Pawnee Tribe of Indians, in addition to many townships not here involved, the following described land:

> * * * fractional townships twenty three (23) * * * north, range four (4) east: * * *, According to a plat of said lands hereto annexed, marked "A", and made a part of this conveyance * * *.

The plat accompanying this deed shows the fractional township as bounded on the north by the Arkansas River (Fdgs. III (c) and III (i), R. 57, 59; Pltf.'s Ex. 6, R. 107–110a). By agreement between the Pawnee Tribe and the United States, dated November 23, 1892 (I Kappler, *Indian Affairs, Laws and Treaties*, pp. 496–498), the Pawnee Tribe ceded and relinquished to the United States its beneficial interest in the reservation lands. Article II of the agreement pro-

[1] In its finding III (h), the trial court inadvertently named Range 3, whereas the proper designation is Range 4.

vided for the making of allotments to individual Pawnee Indians. In the Act of March 3, 1893, 27 Stat. 612, 644, which Act implemented that agreement, Congress provided in Section 12 for payment to the Pawnee Tribe of the sum of $80,000 for the cession; money was also provided for the expense of making the allotments "provided for in said agreement."

Thereafter, on October 9, 1893, there was issued to Horace Field, a Pawnee Indian, a trust patent covering the following described lands:

> The South East quarter of the North West quarter, and the Lots numbered one, two and three of Section nineteen in Township twenty-three North of Range four East of the Indian Meridian, in Oklahoma Territory, containing one hundred and twenty-one acres and sixty-six hundredths of an acre.

Title is now held by the United States in trust for four named heirs of Horace Field (Fdg. IV (a), R. 59; Pltf.'s Ex. 2, R. 102–103). Also, on October 9, 1893, a trust patent was issued to William Bayhylle, a Pawnee Indian, covering the following described land:

> The west half of the northeast quarter of section twenty and the southwest quarter of the southeast quarter and the lot numbered six of section seventeen in Township twenty-three north of Range four east of the Indian Meridian, Oklahoma Territory

containing one hundred and twenty-nine acres.

Title is now held by the United States in trust for eight named Indian heirs of the allottee (Fdg. IV (b), R. 60; Pltf's Ex. A, R. 100–101). These two Pawnee allotments are also bounded by the Arkansas River, as shown on the plat appearing at R. 32a.

All four of the trust allotments were issued under Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, and the trust period has been extended by Executive Orders, as provided therein (Fdg. IV, R. 61).

The State of Oklahoma was admitted to the Union on November 16, 1907 (Fdg. VIII, R. 61), so that all of the allotments were made prior to the existence of the State.

On July 20, 1942, the State of Oklahoma executed two oil and gas leases in favor of petitioner Champlin Refining Company, covering the south half of the Arkansas River bed for a considerable distance including the area adjoining the four Indian allotments already set out, and the Champlin Refining Company has drilled one well which is producing in commercial quantities (Fdg. X, R. 62; Pltf's Exs. A and B, R. 13–20). The areas covered by these leases and the location of the well are shown on the plat at R. 32a.

On July 13, 1943, the United States began the instant proceeding by filing its complaint against the Champlin Refining Company, a New Mexico

corporation (R. 1–13).[2] In that complaint, the Government pleaded the various grants, reservations, conveyances, and allotments hereinbefore set forth. The complaint stated that under the lands held in trust by the United States for its allottees or their heirs, there were valuable mineral deposits consisting of oil and gas; that the State of Oklahoma on July 20, 1942, had executed the two leases hereinbefore noted in favor of the defendant Champlin Refining Company, which leases covered the portions of the south half of the Arkansas River bed opposite the allotments; and that said leases were given without the authority of the United States, the allottees, the heirs of the allottees, or the Secretary of the Interior. It was further alleged that the Arkansas River at the points in question was not a navigable stream at the time Oklahoma was admitted to the Union, and that the river at those points had been determined to be non-navigable in the case of *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77 (1922); that, under the leases, the defendant claimed rights to the oil and gas under the bed of the river and within the boundaries of the allotments, and that the defendant was threatening to begin prospecting for oil and gas within the boundaries of said allotments. The Government asserted

[2] Champlin Refining Company, an Iowa corporation, was also made a defendant, but that corporation filed a disclaimer of interest and was eliminated from the case (R. 21).

that the State of Oklahoma had no proprietary title or interest in the bed of the Arkansas River and was without power to confer by leases or otherwise any title or interest in those portions of the river bed adjoining the allotments, that defendant was trespassing, and that the leases (attached as Exhs. A and B to the complaint) had been recorded and constituted a cloud upon the title of the United States, its allottees, and heirs of the deceased allottees. The complaint prayed that the defendant be enjoined from trespassing upon the river bed and drilling for minerals thereunder, that the leases be cancelled, that the defendant be enjoined from asserting any title to the river bed and that title be quieted in the United States, its allottees and the heirs of deceased allottees.

On August 5, 1943, the Champlin Refining Company filed an answer (R. 21–22) and the State of Oklahoma subsequently filed an answer (R. 24–26), the State having been granted leave to intervene by order of August 20, 1943 (R. 24). The answers of these two parties as amended (R. 27–28) admitted execution of the oil and gas leases but alleged, in effect, that the State of Oklahoma was the owner of the river bed included in the leases because the river bed became the property of the State upon its admission to the Union. It was further alleged that the United States Supreme Court had sustained the right of

the State of Kansas to declare its rivers to be navigable, that Kansas had declared the Arkansas River to be navigable within its boundaries, and that the State of Oklahoma would be denied equal protection of the laws guaranteed by the Federal Constitution if the claim of the United States were sustained.

On October 15, 1943, pretrial proceedings were had (R. 75–95).[3] In connection with their amended answers, the defendants introduced as Exhibit 15 (R. 139–140) an affidavit by one Hawkins, Chairman of the Kansas Board of Administration, to the effect that Kansas is the owner of the bed of the Arkansas River in that State and has executed oil and gas leases and collected rents and royalties. This exhibit was admitted over the objection of the United States that it was immaterial (R. 89–90). On November 19, 1943, the United States filed its motion for summary judgment (R. 29) but this motion was denied on August 8, 1944 (R. 35).

The case came on for trial on September 16, 1944 (R. 95–100). At that proceeding, a stipulation was executed to the effect that it shall be considered that the United States has introduced evidence showing that the Arkansas River is not

[3] The State of Oklahoma had denied the allegations as to the chain of title, the allotments made to individual Indians and the extension of the trust periods thereon. At the pretrial hearing, the Government introduced evidence to sustain its allegations.

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navigable in fact at the places in question "on all material dates in this controversy"; the stipulation also provided that the defendants had introduced no evidence on that question and that they objected to such evidence on the ground that by reason of the decision in *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, such evidence was immaterial and irrelevant because that decision constituted a rule of property binding upon the court (R. 45–46, 96). In addition, the facts as above outlined were established by stipulation or exhibit, and certificates of the Chairman of the Board of Administration of the State of Kansas (R. 49–56) relative to drilling operations in that State were introduced in evidence over objection by the United States that they are irrelevant and immaterial (R. 98).

On December 21, 1944, the court filed its findings of fact and conclusions of law (R. 57–67). In addition to the findings already noted, the court found that in all of the reservations, grants, and conveyances, the bed of the river was neither expressly included nor excluded (Fdg. V, R. 61); that "the Arkansas River, at the points in question in this litigation and * * * at all times herein material, is not navigable in fact" (Fdg. VII, R. 61); that the Supreme Court of Oklahoma, in *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, took judicial notice of the fact that the Arkansas River is navigable throughout the State and that

the bed thereof is the property of the State (Fdg. VIII, R. 61); that the State of Oklahoma, by statute of May 28, 1919, 64 O. S. A. section 290, had declared that the beds of rivers within the State two chains or more in width are the property of the State, and that the Arkansas River, at the points here involved, is more than two chains in width (Fdg. IX, R. 61); that the Supreme Court of Kansas in *Hurst* v. *Dana,* 86 Kan. 947, had taken judicial notice that the Arkansas River was navigable within that State and that the State owned the river bed, and that Kansas had given leases upon the river bed and producing wells had been drilled therein (Fdg. XI, R. 62). The court concluded that the State had power to declare rivers navigable and so limit the title of riparian owners except where title to the river bed had been expressly granted by the United States prior to statehood, and that the decision in *State* v. *Nolegs,* 40 Okla. 479, 139 Pac. 943, is the binding and controlling rule of law in this case (Concl. II, R. 66); it further concluded that the State of Oklahoma is the legal owner of the river bed at the points in question, that Champlin Refining Company has a valid lease on such lands (Concl. III, R. 66), and that the United States, in behalf of its restricted wards, has no right, title or interest in or to such portions of the river bed as are here involved (Concl. IV, R. 66–67). A decree was entered to this effect

(R. 67)[4] from which the United States appealed (R. 68).

The Circuit Court of Appeals held (R. 141–150) that title to the beds of nonnavigable rivers remains in the United States after the admission of a new State to the Union; that the question of navigability is a federal question and that navigability in fact is the test in law; that under the trust patents issued prior to the formation and admission of the State of Oklahoma to the Union, title to the bed of the river at the points in issue vested in the United States in trust for the Indian allottees, and that Oklahoma could not adopt a retroactive rule for determining navigability which would destroy that title. Accordingly, that court reversed the judgment of the trial court and remanded the case with instructions to enter judgment for the Government (R. 150).

SUMMARY OF ARGUMENT

I

The United States acquired the lands in question under the Louisiana Purchase. No express grant either of the river bed or of the riparian

[4] On June 26, 1944, a stipulation was filed providing that in the event of a decision adverse to the claim by the United States of title as trustee for its Indian wards, neither of the defendants would plead the judgment as *res judicata* in any subsequent proceedings brought by the Government on a claim of title in itself (R. 34). In view of this stipulation, the trial court limited its conclusions to passing upon the Government's claim on behalf of the allottees (R. 65) and

tracts has been made to the State of Oklahoma. That State's claim to title, therefore, rests entirely upon the contention that the title passed to Oklahoma by operation of law upon its admission to the Union.

A. It is undisputed that a new State upon its admission does not thereby acquire the beds of nonnavigable streams. And it is well settled that whether or not a stream is navigable for this purpose is a federal question and that the federal rule applies the test of navigability in fact. Since the Arkansas River has been found by both courts below and is conceded by petitioners to be nonnavigable in fact, Oklahoma did not acquire title thereto upon its admission.

B. Petitioners' argument that a state court decision holding the river to be navigable, contrary to the fact, and a state legislative assertion of ownership of the river bed, are conclusive in this litigation is erroneous since the question of navigability is a federal question. Moreover, this exact contention has been rejected by this Court more than once. *Oklahoma* v. *Texas*, 258 U. S. 574; *Brewer Oil Co.* v. *United States*, 260 U. S. 77; *United States* v. *Oregon*, 295 U. S. 1. *Wear* v. *Kansas*, 245 U. S. 154, does not support their contention.

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the third paragraph of the decree dismissed this claim (R. 67). Thus, the second paragraph of the decree simply sustains the State's title as against the claim of the United States as trustee for the allottees.

C. The notion of petitioners that the mere execution of trust patents to the Indians embracing riparian lands, which petitioners say did not include lands in the river bed, operated as a grant to the State of title to the river bed is unsupportable. *United States* v. *Oregon*, 295 U. S. 1, 27. Hence, it is no concern of petitioners whether, as the United States concedes, the trust patents conveyed the river bed to the Indians. There is clearly no distinction so far as the determination of navigability is concerned between a claim of the United States asserted on behalf of its Indian wards and one asserted on its own behalf. In *Oklahoma* v. *Texas*, 258 U. S. 574, the United States asserted and prevailed on both types of claims. The decision in *Brewer Oil Co.* v. *United States*, 260 U. S. 77, likewise denies the existence of any such distinction.

D. The claim of petitioners that the local decision has established a rule of property which is binding upon the federal courts plainly lacks merit since the fact is that the decisions of this Court have been recognized even by the Oklahoma courts as establishing a contrary rule of property with respect to the Arkansas River above its confluence with the Grand River.

II

As we have shown, whether or not the beneficial interest in the river bed passed to the Indian allottees under the trust patents or was retained by

the United States is irrelevant to the question of Oklahoma's property rights in the bed of the Arkansas River. However, the fact that, as we will show, the river bed was included in the trust patents is an additional reason why petitioners' position cannot be sustained.

A. Whether patents describing by survey descriptions lands abutting on non-navigable waters include under water lands is primarily a question of intent of the United States in making the grants. Under the circumstances of this case and particularly prior transactions relating to other Indians, it is clear that Congress, treating these Indians on a parity with others, intended that the allottees should have the river bed. Moreover, even if such intent did not so appear, the same result follows when the patents are construed with reference to the local law in effect at the time of the grants—the law of Oklahoma Territory. The conclusion that the trust patents here embraced the bed of the river follows *a fortiori* from this Court's decision in *Oklahoma* v. *Texas*, 258 U. S. 574, where the same result was reached as to patents issued after Oklahoma was admitted to the Union.

B. Since the allottees acquired a vested property right in the river bed at the times the patents issued, the subsequent admission of Oklahoma to the Union and the decision of its courts or declaration of its legislature thereafter could not divest such property right. *Brewer Oil Co.* v. *United*

States, 260 U. S. 77; *United States* v. *Oregon,* 295 U. S. 1. Such action by the State is also barred by Section 3 of the Oklahoma Enabling Act, 34 Stat. 267, 270.

ARGUMENT

I

THE STATE OF OKLAHOMA DOES NOT HAVE TITLE TO THE LANDS IN QUESTION

The lands in question became public domain when the United States acquired them as part of the Louisiana Purchase. The State of Oklahoma has no claim to the river bed at the points in question based upon an express grant of the United States, either of the bed itself, or as an incident of a grant to the State of riparian lands at the points in issue. Consequently, the State's sole reliance is upon the theory that "said lands became the property of the State of Oklahoma by operation of law upon its admission as a State" (Int. Answer, par. 13, R. 25; see also Br. 6).

A. *Since the Arkansas River was not navigable in fact, title to the bed thereof did not pass to the State of Oklahoma upon admission of the State to the Union.*—It is well settled that upon the admission of a State into the Union, "on an equal footing with the original States",[5] it acquires title to the beds of navigable rivers within the State. *Shively*

[5] Oklahoma Enabling Act, 34 Stat. 267, 271.

v. *Bowlby*, 152 U. S. 1, 26; *Scott* v. *Lattig*, 227 U. S. 229, 242; *Oklahoma* v. *Texas*, 258 U. S. 574, 583; *United States* v. *Holt Bank*, 270 U. S. 49, 54; *United States* v. *Oregon*, 295 U. S. 1, 14.[8] "But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State." *United States* v. *Oregon*, 295 U. S. 1, 14; *United States* v. *Utah*, 283 U. S. 64, 75; *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 87; *Oklahoma* v. *Texas*, 258 U. S. 574, 591. The United States "has never held its public lands in the territories under unnavigable waters under any such trust * * *." *Brewer-Elliott Oil & Gas Co.* v. *United States*, 270 Fed. 100, 109 (C. C. A. 8). The bed of such a stream is simply a part of the public domain. New States, upon their admission to the Union, do not acquire the public lands within their borders apart from an express grant of such lands by the United States, and there is nothing in the circumstance that land is under water to warrant any different rule with respect to the beds of nonnavigable streams.

It is equally well settled that when a State bases its claim to a river bed upon the principle applicable to navigable streams, the question of

[8] In *United States* v. *California*, No. 12 Original, this Term, the Government recognizes that this is an established principle and urges that it be reaffirmed as applied to cases involving navigable inland waters (Govt.'s Br. p. 143).

navigability is a federal question. In *United States* v. *Holt Bank, supra,* the court said (270 U. S. 49, 55):

> Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.

Again, in *United States* v. *Utah, supra,* the court stated (283 U. S. 64, 75):

> The question of navigability is thus determinative of the controversy, and that is a federal question.

And in *United States* v. *Oregon, supra,* it was said (295 U. S. 1, 14) that "Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local one."

The federal rule or test of navigability was precisely stated in *Oklahoma* v. *Texas,* 258 U. S. 574. In rejecting certain matters there relied upon by the State of Oklahoma as evidence of navigability of the Red River, Mr. Justice Van Devanter, speaking for the court, said (p. 586):

> We find nothing in any of the matters relied on which takes the river in Oklahoma out of the settled rule in this country that navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The federal rule thus stated was applied in *United States* v. *Holt Bank,* 270 U. S. 49, 56, and in *United States* v. *Oregon,* 295 U. S. 1, 14.

In the *Brewer-Elliott* case, in which the State of Oklahoma intervened, it was determined that the Arkansas River is and always had been non-navigable in fact above its confluence with the Grand River. *United States* v. *Brewer-Elliott Oil & Gas Co.,* 249 Fed. 609, 623 (W. D. Okla.). The specific portions of the river bed there in suit are "at the approximate point on the stream" here involved (R. 62). This finding was affirmed by the circuit court of appeals and by this Court. 270 Fed. 100 (C. C. A. 8), 260 U. S. 77. And in the case at bar, the courts below have found that the Arkansas River "at the points in question in this litigation and * * * at all times herein material, is not navigable in fact" (Fdg. VII, R. 61). Petitioners concede this to be a correct

finding (Br. 3–4). It follows that the State of Oklahoma has no title to the river bed.

B. *The State of Oklahoma may not, by applying a local rule of navigability to a stream non-navigable in fact, appropriate to itself property vested in the United States or its grantees.*—Petitioners do not and cannot challenge the finding that the river is non-navigable in fact. They seek, however, to do so indirectly by the assertion that despite such finding, the river is to be treated in law as if it were navigable. They contend (Br. 11, 13) that a decision of the Supreme Court of Oklahoma in 1914 in the case of *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, holding by judicial notice that the Arkansas River is navigable in Oklahoma, fixes the character of the river and is binding upon all subsequent litigants, whether or not parties to the *Nolegs* case, and binding on federal courts, including this Court.

The contention is erroneous because, as we have shown, *supra*, pp. 21–23, the rights of the State are governed by the federal rule of navigability in fact. There is no decision supporting petitioners' view. Indeed, this is the third time that Oklahoma has made the argument, it having already been twice rejected by this Court. In *Oklahoma* v. *Texas*, 258 U. S. 574, relied upon by the Circuit Court of Appeals (R. 148), the United States and Oklahoma litigated title to the bed of the Red River. The Government there claimed the south half of the bed for itself, but its claim

to portions of the north half was made, as here, on behalf of Indian allottees to whom it had issued trust patents for riparian lands on the north bank (258 U. S. at p. 596). Contrary to petitioners' assertion (Br. 48–49), the patents involved in that case, like those here involved, did not expressly convey ownership to the thread of the stream. See *infra*, pp. 44, and 53. In *Oklahoma* v. *Texas*, as here, Oklahoma based its title to the bed of the Red River upon the claim that the river was navigable throughout its course in the State. This Court stated (p. 583) that "the real question in this connection is whether the river is navigable in Oklahoma." After stating that the settled rule in this country is that "navigability in fact is the test of navigability in law" (p. 586), this Court proceeded to examine the evidence on that subject. Among the matters relied upon by Oklahoma was a decision of the Supreme Court of Oklahoma in 1915, *Hale* v. *Record*, 44 Okla. 803, 146 Pac. 587, holding that the river was navigable in fact. This Court rejected the State's reliance upon the state court decision with the following language (258 U. S. at p. 591):

> A decision by the Supreme Court of Oklahoma, in *Hale* v. *Record*, 44 Okla. 803, is relied on as adjudging that the river is navigable in fact. The opinion in the case is briefly to the effect that in the trial court the evidence was conflicting, that the conflict was there resolved on the side of navi-

> gability, and that this finding had reasonable support in the evidence and therefore could not be disturbed. *It was a purely private litigation. The United States was not a party and is not bound* [citing *Economy Light & Power Co.* v. *United States*, 256 U. S. 113, 123]. There is in the opinion no statement of the evidence, so the decision hardly can be regarded as persuasive here. [Italics supplied.]

State v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, here relied upon by petitioners, was likewise a private litigation. Neither the United States nor the allottees for whom it here sued were parties to it. Not only is the *Nolegs* decision not persuasive here, it is clearly erroneous under the finding of both courts below that the river is nonnavigable in fact, which finding petitioners concede to be correct (Br. 3–4). Moreover the *Nolegs* decision, as will be shown (pp. 28–29 *infra*), has previously been held to be erroneous and was rejected by the federal trial and appellate courts, and by this Court, twenty-five years ago in *Brewer Oil Co.* v. *United States*, 260 U. S. 77.

This Court in *Oklahoma* v. *Texas*, *supra*, after holding that the Red River was nonnavigable in fact, stated that (258 U. S. p. 591) "We conclude that no part of the river within Oklahoma is navigable and therefore that the title to the bed did not pass to the State on its admission into the Union," and Oklahoma was decreed to own only those portions of the river bed abutting shore

lands expressly granted to the State (258 U. S. pp. 596, 598). Thus the argument presently advanced by petitioners was flatly rejected by this Court.

The contention that a state judicial determination of navigability, even though erroneous, bound this Court was again rejected in *Brewer Oil Co.* v. *United States,* 260 U. S. 77. There the United States sued certain oil companies for itself and as trustee for the Osage Nation. The oil companies were removing oil from the bed of the Arkansas River adjoining the Osage Reservation, under leases from the State of Oklahoma. The Government claimed the river bed was owned by the tribe, and sought cancellation of the leases, injunctive relief, and asked that title be quieted in the United States as trustee. The State of Oklahoma intervened, claiming to own the river bed in fee. The trial court found the river was and always had been nonnavigable in fact above its confluence with the Grand River, and at the specific points in question here (R. 62), and that the river bed was conveyed to the Osages by a statute of 1872 which expressly fixed the boundary as "the main channel" of the river, 249 Fed. 609 (W. D. Okla.). The judgment in favor of the United States was affirmed by the Circuit Court of Appeals. 270 Fed. 100 (C. C. A. 8). In this Court, Oklahoma claimed that the Arkansas River was navigable. Relying upon language employed by this Court

in *Pollard's Lessee* v. *Hagan*, 3 How. 212, the State argued that the United States had no power to convey the bed under navigable waters and deprive the future State of ownership. Since in the later decision in *Shively* v. *Bowlby*, 152 U. S. 1, 47, this Court had stated that the United States could make such a grant for certain purposes, Oklahoma alternatively argued that the grant to the Osage Nation was not within the purposes named. This Court did not decide either question, since it found the river to be nonnavigable in fact.

Upon the issue of navigability, Oklahoma relied, as it now does here, upon the decision of the Supreme Court of Oklahoma in the *Nolegs* case. This Court noted that it had once previously rejected the State's contention, stating (260 U. S. at p. 87):

> But it is said that the navigability of the Arkansas River is a local question to be settled by the legislature and the courts of Oklahoma, and that the Supreme Court of the State has held that at the very point here in dispute, the river is navigable. *State* v. *Nolegs*, 40 Okla. 479. A similar argument was made for the same purpose in *Oklahoma* v. *Texas*, *supra*, based on a decision by the Supreme Court of Oklahoma as to the Red River. *Hale* v. *Record*, 44 Okla. 803. The controlling effect of the state court decision was there denied because the United States had not been there,

as it was not here, a party to the case in the state court. *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 123.

Thus, for the second time, petitioners' present contention was specifically rejected.

Petitioners rely heavily upon the decision in *Wear* v. *Kansas,* 245 U. S. 154, but that decision is no authority for the proposition that a state judicial determination, contrary to the fact, that a river is navigable, can operate to foreclose the title of the United States or its grantees to the bed of a nonnavigable river. There Wear claimed title to a portion of the bed of the Kansas River, his claim being based upon a federal grant of riparian land in 1860. Navigability in fact was apparently conceded on the pleadings, but he contended that under a territorial statute enacted in 1859, adopting the common law of England, the river was nonnavigable at the time of the grant by reason of the English rule that only tidal waters are navigable, and that under the local law, consequently, his grant carried to the thread of the stream. The Kansas Supreme Court held that navigability in fact was the proper test, relying upon the decision of this Court in *The Genesee Chief,* 12 How. 443. Thus, the state court actually applied the federal rule. On the issue of navigability in fact, the state court took judicial notice that the river was so navigable, and refused evidence on the subject.

In this Court, Wear assigned as error the ruling upon the territorial statute, and also the action of the court in finding, by judicial notice, that the river was navigable in fact. This Court held that the territorial statute had not been erroneously interpreted, pointing out that it had been passed after the decision in *The Genessee Chief, supra*. The Court held further that the territorial statute, merely adopting the common law of England, could not be said to add to the grant of riparian lands a grant of the bed to the thread of the stream, for this "attributes too detailed and precise an effect to a general provision of law." 245 U. S. at 157. Compare the territorial statute here involved, *supra*, pp. 2–3. On the question of judicial notice, a procedural matter, this Court concluded that it could not pronounce it error "if a state court takes upon itself to know without evidence whether the principal river of the State is navigable at the capital of the State," and that "in this aspect" it was a question of state law (245 U. S. 158). Thus, as the Circuit Court of Appeals held (R. 150), the decision in *Wear* v. *Kansas*, was simply that, in the circumstances there presented, which included prior decisions by the state court of the same question, and a virtual concession of navigability in the pleadings, its navigability in fact was a proper subject for determination by judicial notice. In saying (p. 158) that "The fact is of a kind that should be established once for all,

not perpetually retried," the court obviously was not saying that the first determination of this federal question by a state court was thereafter conclusive.

Thus, this Court in the *Wear* case was dealing in terms of a river properly found, on the record presented, to be navigable *under the federal rule.* However, if it had been there acknowledged by Kansas that the state court determination was contrary to the fact, as Oklahoma here acknowledges the *Nolegs* decision to be erroneous, obviously a different question would have been before this Court.

This analysis of the *Wear* decision is confirmed by the subsequent decision of this Court in *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 89. In language stressed by petitioners (Br. 45–46), the Court there stated:

> Some States have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact. In such a case, navigability *vel non* is not a local question. In *Wear* v. *Kansas,* 245 U. S. 154, upon which the appellants rely, the patent of the United States under which

> Wear derived title was a grant, made before statehood, of land bordering on the Kansas River without restriction, reservation or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on a navigable stream did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a nonnavigable stream, was immaterial. In either view the result there would have been the same. The case of *Donnelly* v. *United States,* 228 U. S. 243, is to be similarly distinguished, if, indeed, it can be said after the qualification of the opinion, 228 U. S. 708, 711, to require distinguishing.

In considering this language it should first be noted that the Court recognized that a State declaration of a non-navigable river as navigable could not conclude "one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact." The United States and its Indian wards for whom it here sued fall exactly into that category (Point II, *infra*). The remainder of the quoted excerpt states a principle

with which we have no quarrel; *i. e.*, where the federal grant neither specifically grants nor withholds rights in the bed of the stream, it will be presumed that the intent of the United States was to have the grant construed under the applicable local law in order to determine whether the United States had conveyed its rights to its grantee or had retained the river bed. When reference is properly made to that law, it is of no consequence whether the law expressly denies river bed ownership to a riparian owner or accomplishes the same thing by treating the river as navigable, although it may not in fact be so. But the *Brewer Oil* case makes it clear that local law of this sort is properly controlling only if the federal grant is, in terms, inconclusive.[7] If the trust patents here involved be regarded as inconclusive, and reference be made to local law in this case to determine the rights of the Indian grantees, the controlling local law here is the law of the Oklahoma territory under which the Indians took to the thread of the river. See pp. 59–61, *infra*.

The *Wear* case is thus no authority at all for the proposition that a state judicial determination of navigability in a case to which the Government

[7] That the words "without restriction, reservation or expansion," used in the *Brewer Oil* case, p. 32, *supra*, were intended to describe a grant inconclusive on its face with respect to the bed of the adjacent waters, is indicated by the use of very similar language in *Hardin* v. *Jordan*, 140 U. S. 371, 384, in a context which makes this meaning even clearer.

is a stranger, and which is found by the federal courts, in subsequent litigation between the State and the United States, to be erroneous and contrary to the fact, and conceded by the State to be erroneous, is binding on the United States or its grantees and operates to give the bed of the river to the State. As said by this Court in *United States* v. *Oregon*, 295 U. S. 1, 27:

> * * * in no case has this Court held that a state could deprive the United States of its title to land under non-navigable waters without its consent, *or that a grant of uplands to private individuals, which does not in terms or by implication include the adjacent land under water, nevertheless operates to pass it to the State.* Whether, on any theory, such a result could be upheld was a question expressly reserved in *Hardin* v. *Shedd*, 190 U. S. 508, 519; *Whitaker* v. *McBride*, 197 U. S. 510, 515; *Marshall Dental Co.* v. *Iowa*, 226 U. S. 460, 462. [Italics supplied.]

And this Court there flatly rejected (pp. 28, 29) the argument that a State could so acquire title.

Moreover, *Oklahoma* v. *Texas*, 258 U. S. 574, was decided after the *Wear* case. As already noted (pp. 24–27, *supra*), the *Oklahoma* case is exactly in point here and specifically rejects petitioners' contention. The same court which decided *Oklahoma* v. *Texas*, decided the *Brewer Oil Co.* case in the same year, and as shown (p. 28, *supra*) cited the *Oklahoma* decision with approval.

Since petitioners' position here is irreconciliable with this Court's holding in *Oklahoma* v. *Texas,* it is idle to argue that anything said in the *Brewer Oil Co.* decision supports it.

Petitioners also rely upon the decision in *Donnelly* v. *United States,* 228 U. S. 243 (Br. 41). As intimated in the *Brewer Oil Co.* decision (260 U. S. 77, 89), so much of the *Donnelly* decision as related to the effect of state determinations of navigability was subsequently withdrawn in an opinion on rehearing, 228 U. S. 708. Passing this, however, the first *Donnelly* decision does not sustain petitioners' present assertion of a State's power to acquire title to the bed of a non-navigable stream by erroneously declaring or judicially determining it to be navigable. In the *Donnelly* case, a tribal reservation was created by executive order in 1891, after the admission of California to the Union. The reservation included "a tract of country one mile in width on each side of the Klamath River * * *" (228 U. S. p. 253). In connection with the question of federal jurisdiction over a crime committed on the river, the issue arose as to whether the bed of the river itself was part of the reservation. Donnelly insisted that the Klamath was a navigable river. The court reviewed the authorities which hold that the bed of a river navigable in fact belongs to the State. After stating that the question of "navigability in fact of non-tidal streams is sometimes a doubtful one," the Court

used the following language (228 U. S. p. 262) which is quoted and relied upon by petitioners (Br. 41):

> But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several States.

But the language does not mean that a State can acquire the bed of a non-navigable river simply by characterizing the river as navigable. This is shown by what preceded this sentence (228 U. S. at pp. 261–262) and by the sentence immediately following, omitted by petitioners in their quotation, reading:

> Thus the State of California, if she sees fit, may confer upon the riparian owners the title to the bed of any *navigable* stream within her borders. [Italics supplied.]

The *Donnelly* case simply held that whether the river was navigable or non-navigable, the United States owned the bed thereof since if the river were navigable in fact California had elected to surrender the bed to riparian owners, and the United States was the sole riparian owner at the point in issue. The point of the discussion relied upon by petitioners was that States were free to retain the old English rule of navigability, restricting "navigable" waters to those that were tidal, and thus foregoing the State's rights to other non-tidal, but nevertheless navigable wa-

ters under the Federal test announced in *Genesee Chief* v. *Fitzhugh*, 12 How. 443. Cf. *Barney* v. *Keokuk*, 94 U. S. 324. There is nothing in the *Donnelly* decision to support the notion that a State, by declaring navigable a stream non-navigable in fact, can thereby acquire the bed.

The State of Kansas, in its brief as *amicus curiae* in this case, calls attention to such decisions as *United States* v. *Holt Bank*, 294 Fed. 161, 166 (C. C. A. 8), where the Circuit Court of Appeals, relying upon the *Donnelly* decision in this Court, held it was bound by the law of Minnesota on the question of navigability. But on appeal this Court held this to be erroneous. *United States* v. *Holt Bank*, 270 U. S. 49, 55–56. This Court there stated:

> Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. Navigibility, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co.* v. *United States, supra*, p. 87. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was in-

> tended. But nothwithstanding the error below in accepting a wrong standard of navigability, the findings must stand if the record shows that according to the right standard the lake was navigable.

This Court then proceeded to state the federal rule of navigability in fact to be applied. It is worthy of note that in that case the claim of the United States was likewise based on a holding of land in trust for sale for the benefit of Indian wards. However, this Court, finding that the lake was navigable in fact, held that the bed thereof passed to the State on its admission to the Union.

Kansas v. *Colorado*, 206 U. S. 46, also cited by Kansas (Br. 7, 9) is not helpful here. It did not involve title to the bed of the river, but the power of a State to regulate the use of the water on other than the common-law basis of equal use, two unrelated subjects. This Court said in *Oklahoma* v. *Texas*, 258 U. S. 574, 596, in answering a contention by Oklahoma that the common-law rule, by which the bed of a non-navigable stream passes with a grant of shore land, had been abrogated in Oklahoma:

> * * * It is based on statutes displacing or qualifying the common-law rule respecting the rights of riparian proprietors in the natural flow of a stream, which is a matter quite distinct from the ownership of the bed of the stream. The rule as to either could be displaced without affecting the other.

Kansas does not state expressly that the Arkansas River in Kansas is non-navigable in fact. If the river is navigable in fact, then the claim of Kansas to the bed is not in any wise affected by the decision below. If the river has always been non-navigable in fact, then Kansas never had any right to the bed. *Oklahoma* v. *Texas*, 258 U. S. 574, 591. If it is non-navigable in fact, it was error to find it navigable by judicial notice. Judicial notice embraces facts so well known that a court needs no evidence to prove them. It is not a blank check to courts to find facts which are non-existent. If the Kansas River is non-navigable in fact, then as a result of the state judicial determination mentioned in *Wear* v. *Kansas*, 245 U. S. 154, the State has appropriated property to which it never was entitled.

Kansas (Br. 10) urges that the decision below will lead to suits by riparian owners of lands along the river in that State, resulting in a confusion of titles. It is unnecessary in this case to speculate on the outcome of such litigation if it develops. Kansas cites no principle which requires that, if Kansas has mistakenly appropriated the bed of a river in that State, this Court is compelled to grant equally baseless rights to Oklahoma. The principle of equality upon which Oklahoma does and must rely entitles that State to the beds of navigable rivers only. There is no principle of equality among States to confiscate

the property of others. Oklahoma has no more interest in the bed of a nonnavigable river than in any other public lands in the State. Mineral wealth underlying dry public lands would not justify the State in asserting a property right in such land. The mineral wealth under the bed of the Arkansas River is the sole motivating interest in Oklahoma's effort to seize the bed. That interest does not create in the State a right, by a perversion of the test of navigability, to "destroy a title already accrued under federal law and grant * * *" or to "enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked." *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 88.

There remains for consideration, on this phase of the case, the Oklahoma Statute said by petitioners (Br. 3) to "reinforce" the *Nolegs* decision. That statute, 64 O. S. A. sec. 290 (p. 3, *supra*), enacted many years after all federal grants here in question had been executed, declares that all streams two chains or more in width are the property of the State. The Arkansas River at the points in question is in excess of that width (Fdg. IX, R. 61). This statute does not deal in terms of navigability. However that may be, and assuming it is a declaration of ownership of all streams of the class regardless of navigability, it cannot affect the title of the United States to the river bed at the points here involved.

Here again, the contention now advanced by petitioners has been specifically rejected by this Court. In *United States* v. *Oregon*, 295 U. S. 1, the state statute declared that the beds of lakes meandered by United States surveys were the property of the State. The lake there involved had been so meandered, but the court found it was nonnavigable in fact, and, in disposing of the claim of the State based upon the statute passed years after all conveyances there involved were executed, used the following language (pp. 28–29):

> The State, in making its present contention, does not claim as a grantee designated or named in any grant of the United States. It points to no rule ever recognized or declared by the courts of the State that a grant to individual upland proprietors impliedly grants to the State the adjacent land under water. The only support for its claim is the statute of 1921, adopted subsequent to every grant of the United States involved in the present case. *The case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States.* Such action by the State can no more affect the title of the United States than can the similar legislative pronouncements that streams within

> a State are navigable which this Court has found to be non-navigable. See *Oklahoma* v. *Texas, supra; United States* v. *Utah, supra,* 75; *United States* v. *Holt State Bank, supra,* 55 56. [Italics supplied.]

It is thus settled by the decisions of this Court that a State may not by means of local judicial decisions or by local statutes appropriate to itself the beds of nonnavigable streams.

C. *The fact that the United States brought this suit on behalf of its Indian wards to whom trust patents had been issued does not enlarge the rights of the State of Oklahoma.*—As we will show in point II, *infra,* pp. 52–63, the trust patents issued to the Indian allottees conveyed to them the beneficial interest in the bed of the river where it abuts the allotments. However, whether the trust patents did so or not is essentially a matter which concerns only the United States and the Indians. Compare *Oklahoma* v. *Texas,* 258 U. S. 574, 596–597, where, in response to Oklahoma's contention that the Indian allotments had not been carried to final patents, the Court said: "Even if this were so, it may well be doubted that it would enable strangers to fasten any claim on or appropriate the bed in front of the allotments." Petitioners' argument that the trust patents did not embrace the river bed would be relevant only if their further contention that the mere issuance of the trust patents constituted a conveyance to the State of the river bed were

accepted. This latter argument clearly lacks merit. Petitioners rely (Br. 38) upon *Hardin* v. *Shedd*, 190 U. S. 508, to support this proposition. But for fear that such an argument would be later made, Mr. Justice Holmes in the *Hardin* opinion stated (p. 519):

> The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise, apart from the Swamp Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point.

The claim advanced by the Government in this case is a claim of title in trust for its Indian wards. (R. 1–13). But this fact gives the State no right to challenge the Government's concession that its allottees have title to the bed unless different principles apply where the Government's claim of title is in trust for Indian wards than would apply if the Government's claim were of a title in itself free of any trust. That the United States would prevail where title wholly in itself is the basis of its claim is beyond question. *United States* v. *Utah*, 283 U. S. 64; *United States* v. *Oregon*, 295 U. S. 1. The district court so held (R. 64) and petitioners virtually concede this (Br. 47). The same rule that navigability in fact

is controlling, applies where the United States holds property in trust for Indian Tribes or allottees. *United States* v. *Holt Bank*, 270 U. S. 49; *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 81; *Oklahoma* v. *Texas*, 258 U. S. 574. In the two cases last cited, the rule of navigability in fact was held to control notwithstanding prior state court adjudications (in cases to which neither the United States nor its wards were parties) that the river was navigable.

In *Oklahoma* v. *Texas* the United States claimed the title of the south half of the river bed for itself and portions of the north half in trust for Indian allottees. The claim of Oklahoma based upon the erroneous state judicial determination of navigability was rejected as to the entire river bed, no distinction being made as to the capacity in which the United States was asserting the claim. This decision is, we submit, conclusive that, contrary to petitioners' assertions (Br. 47–49), the State has no greater rights against the United States as trustee for Indian allotees than it does against the United States itself. The fact, emphasized by petitioners (Br. 48–49) in attempting to distinguish the *Oklahoma* decision, that the Indian tribal reservation, prior to allotment, was expressly bounded by the "middle of the main channel" of the river was irrelevant as far as Oklahoma's claim based upon its admission to the Union was concerned and was important only

in determining the rights of grantees of the United States.

Petitioners seek (Br. 47) to escape the effect of this Court's decision in *Brewer Oil Co.* v. *United States,* on the ground that the grant to the Osage Nation expressly included the river bed. But the attempted distinction is invalid. The fact that the grant was express with respect to the river bed simply removed from the case any question as to the intent of the United States in making the grant. As previously noted (*supra,* p. 28) because of the express grant, Oklahoma was committed to argue (1) an absolute lack of power in the United States to convey the bed of a navigable water, and alternatively (2) a lack of power to make such a conveyance for the purpose which prompted the grant to the Osage Nation. Both of these challenges were based upon the same claim now made, that the State acquired title, upon its admission to the Union, to the beds of navigable streams. This Court stated (260 U. S. at p. 86):

> We do not find it necessary to decide either of these questions, in view of the finding as a fact that the Arkansas is and was not navigable at the place where the river bed lots, here in controversy, are.

In so ruling this Court necessarily disposed of petitioners' present argument. They here contend that, since the State Supreme Court has once decided that the river was navigable, the courts

below and this Court are bound by the determination. If that were so, this Court could not have so avoided the questions raised by Oklahoma in the *Brewer Oil Co.* case, since it would have followed that this Court had to treat the river as navigable and deal with the power of the United States to convey the bed.

These decisions establish the proposition that property, or claims of title to property asserted by the United States on behalf of its dependent Indian wards, are unaffected by prior state court determinations of navigability. Moreover, it may be noted that, even where different issues are involved, property held by the United States in trust for Indian wards is accorded the same immunity from State action as is property held beneficially by the United States. Thus a State can not, without Congressional consent, condemn property held by the United States under trust patents for its Indian allottees. *Minnesota* v. *United States,* 305 U. S. 382. There this Court recognized (fn. 1, p. 386) that such a title in the United States "is not a dry legal title divorced from substantial powers and responsibilities with relation to the land." Cf. *Town of Okemah* v. *United States,* 140 F. 2d 963 (C. C. A. 10), where the fee was in the Indian subject to federal restraints on alienation. Similarly, the State can not, absent Congressional consent, bring the taxing power to bear upon such lands. *United States* v.

Rickert, 188 U. S. 432; *United States* v. *Board of Com'rs of Fremont County, Wyo.,* 145 F. 2d 329 (C. C. A. 10), certiorari denied, 323 U. S. 804. Thus, even where the most vital State powers are concerned, the power to condemn and the power to tax, the principles and immunities applicable to property beneficially owned by the United States have been recognized as affording the same protection where the Government's title is in trust for its dependent Indian wards.

As the decisions hereinbefore reviewed show, whether the United States asserted title to land beneath waters in its own behalf or on behalf of its Indian wards, this Court has in every instance recognized navigability in fact as the controlling factor, and this notwithstanding state court determinations of navigability. Petitioners cannot cite an instance to the contrary.

D. *The decision in* State *v.* Nolegs *is not conclusive as a rule of property.*—Petitioners contend (Br 62) that the local decision in *State* v. *Nolegs* constitutes a rule of property and is, therefore, conclusive that the Arkansas River is navigable throughout Oklahoma. Certainly any "rule of property" resulting from general acceptance of the *Nolegs* decision could not operate retroactively to deprive persons of titles vested long prior to that decision (see *infra,* pp. 61–63). That decision purported merely to find the fact of navigability and did not enunciate any new principle of law.

In fact, Oklahoma was twice advised that local decisions do not have the effect now sought to be given the *Nolegs* case.

In *Oklahoma* v. *Texas*, 258 U. S. 574, this Court held the Red River to be nonnavigable in fact despite an earlier contrary decision in *Hale* v. *Record*, 44 Okla. 803, 146 Pac. 587, and held that the State did not have title to the bed by virtue of its admission to the Union. And when, in *Brewer Oil Co.* v. *United States*, 260 U. S. 77, this Court affirmed the finding of the lower courts that the Arkansas River was not navigable in fact above its confluence with the Grand River[*] (249 Fed. 609, 623), notwithstanding the prior decision in *State* v. *Nolegs*, it follows that Oklahoma and the world understood that she had no title to any part of the river bed above that point as to which she had received no grant.

Thus, the decree in the *Brewer Oil Co.* case established a rule of property under which conveyances have been made during the past twenty-five years. In Glassmire, *Law of Oil and Gas Leases* (1938 Ed.) at page 265, it is stated:

> On the contrary, in the adjoining state of Oklahoma there has been much litigation during the past fifteen years over the river beds of the Arkansas, Red, Cimarron and Canadian Rivers, which has finally been

[*] The lands here in suit are on the opposite shore of the Arkansas River (R. 62) at approximately the same point above its confluence with the Grand River.

> determined against the state and in favor of the riparian owners, the Oklahoma courts having taken judicial notice that such streams, and tributaries thereof, were not navigable in fact.

And after citing the *Brewer-Elliott* litigation the same authority states (p. 265):

> * * * Under this general rule of nonnavigability in fact, the bed of the Arkansas River in the Cherokee and Creek Nations also belongs to the present riparian owners.

Moreover, Oklahoma itself recognized the *Brewer-Elliott* adjudication as a rule of property. In *United States* v. *Hayes*, 20 F. 2d 873 (C. C. A. 8) ownership of portions of the Arkansas River was in issue, rival claimants being the Creek Tribe, on the one hand, and Creek allottees holding patents covering riparian lands and silent on the question of the river bed. The State of Oklahoma intervened. The opinion of the court (p. 876) states:

> At first, this was a triangular contention in which there were three classes, each of which claimed an exclusive title. These were the Creek Nation, the state of Oklahoma and the owners (or their lessees) of the adjacent shore lands. During this litigation, the Supreme Court decided a case (*Brewer Oil Co.* v. *United States*, 260 U. S. 77, 86, 43 S. Ct. 60, 67 L. Ed. 140), which determined the nonnavigable character of the Arkansas river above the mouth

> of the Grand river. As the lands here involved were above the mouth of the Grand river, that decision eliminated the state of Oklahoma as a claimant. The state recognized this situation by filing a formal stipulation that a decree might be taken against it.

In that case, as here, title to the bed was awarded to Indian allottees whose allotments contained "no express grant nor express reservation of the lands in the river beds" (20 F. 2d 877). Thus petitioners can not explain away the State's disclaimer in the *Hayes* case on the ground that there was an express grant of the river bed. That is the basis on which they try to limit the decision in the *Brewer Oil Co.* case (Br. 47), previously examined and shown to be invalid (pp. 45–46, *supra*).

Further evidence that Oklahoma fully understood the effect of this Court's decisions in the *Oklahoma* v. *Texas* and *Brewer Oil Co.* cases is found in the fact that, although the presence of mineral wealth beneath the bed of the Arkansas River at the precise point here involved gave rise to the *Brewer Oil Co.* litigation, and thus was known to the State at least twenty-five years ago, the State made no attempt to assert title to the south half of the bed until 1942, when it executed the leases which precipated this litigation (R. 13–20).

Finally the Supreme Court of Oklahoma itself, in *Vickery* v. *Yahola Sand & Gravel Co.*, 158

Okla. 120, 12 P. 2d 881, has recognized that, as a result of the decision in the *Brewer Oil Co.* case, insofar as the Arkansas River above its confluence with the Grand River is concerned, the decision in *State* v. *Nolegs* is not the law in Oklahoma. The court was there dealing with the river at a point below the confluence of the Arkansas and the Grand River, but the court stated (12 P. (2d) at 882):

> It is contended that the decision in the *Nolegs Case* is no longer the law in Oklahoma. That the same question was involved in *United States* v. *Brewer-Elliott Oil & Gas Co.*, in the District Court for the Western District of Oklahoma, 249 F. 609, 610, affirmed by the United States Circuit Court of Appeals, *Brewer-Elliott Oil & Gas Co.* v. *United States*, 270 F. 100, and by the Supreme Court of the United States, 260 U. S. 77, 43 S. Ct. 60, 67 L. Ed. 140, and in subsequent cases, wherein the federal courts refused to follow the *Nolegs Case*.
>
> This is undoubtedly true as to the holding that the court takes judicial notice that the Arkansas river is navigable through its course in Oklahoma.

Petitioners seek to overcome this by arguing (Br. 51) that the Court there held that the *Nolegs* decision has never been repudiated. But the language relied upon does not support this. What the Court held is that the *principle* that a State owns the beds of *navigable* streams has

never been repudiated. Conceding this principle, the Government insists that it can not be expanded, at the will of the State, to include the beds of streams not navigable in fact.

There is thus not only an entire lack of basis for petitioners' claim that a rule of property evolved from the *Nolegs* decision, but it clearly appears that the rule of property is adverse to the present pretensions of petitioners.

II

THE TRUST ALLOTMENT PATENTS ISSUED BY THE UNITED STATES TO ITS DEPENDENT INDIAN WARDS EMBRACED THE BED OF THE RIVER AND OKLAHOMA CANNOT RETROACTIVELY DIVEST SUCH TITLE

We have shown in point I, *supra,* that Oklahoma has no property right in the bed of the Arkansas River. The United States and its Indian wards are agreed that the patents to the allottees gave them the beneficial interest in the river bed. Petitioners' argument that this is not so does not, even if true, establish an interest of Oklahoma in the river bed (see *supra,* p. 43). In addition, as we shall now show, the contention lacks merit.

A. *The trust patents embraced the bed of the river.*—The trust patents issued by the United States to its Indian wards (R. 100–106) in express terms covered riparian lands on the south bank of the Arkansas River, and "the bed of the Arkansas River itself was neither expressly in-

cluded or excluded from the lands set aside for the Indians" (Fdg. V, R. 61). Here again *Oklahoma* v. *Texas*, 258 U. S. 574, is precisely in point. In that case, the Government asserted title on behalf of Indian allottees to portions of the north half of the river. There, as here, the lands were surveyed and meandered, but the township and sectional lines were not extended across the river (p. 585); the disposals were made according to the legal subdivision established by the survey and shown on the official plat and "In the patents there was no express inclusion or exclusion of rights in the river bed" (p. 595). The only difference between that case and this lies in the fact that, whereas all the trust patents in this case were issued prior to the admission of Oklahoma into the Union, there the trust patents issued in 1909 and 1910, after admission of the State (p. 596). In declaring the rule for the construction of the trust patents there involved, this Court stated (258 U. S. at pp. 594–595):

> Where the United States owns the bed of a nonnavigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that

> intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies. Where it is disposing of tribal land of Indians under its guardianship the same rules apply.

In *Oklahoma* v. *Texas, supra,* after finding the river to be nonnavigable in fact, this Court determined that the patents there involved carried title to the river bed, first, because the antecedent Congressional policy revealed an intention to part with the river bed along with the shore lands, and second, on the entirely independent and alternative ground that the patents had such effect under the local law in force when the Government made the grants—in that case the law of the State of Oklahoma since the patents there issued after the State was admitted to the Union.

So here, the Government submits, first, that the history preceding the issuance of the trust patents reveals an intention on the part of the United States to part also with the river bed,[9] and secondly, that the trust patents had that effect by virtue of the local law obtaining at the time of the issuance of the patents.

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[9] The United States also made this contention in the Circuit Court of Appeals. That court, however, in holding that the patents carried title to the bed under local law, did not find it necessary to pass upon this question.

1. *The trust patents were issued pursuant to a broad Congressional policy which shows an intention to convey the river bed along with the riparian lands.*—By Article XVI of the Treaty of July 19, 1866, 14 Stat. 799, the Cherokee Nation agreed that the United States might settle friendly Indians in the Cherokee country west of 96°. This area became known as the Cherokee Outlet (Fdg. III (c), R. 57–58), and embraced lands on both sides of the Arkansas River at the points here in question. The treaty also provided that the Cherokee Nation would convey the lands so selected and utilized by the United States. The first implementation of this policy by the United States was in the following year when, by the Treaty of October 28, 1867, 15 Stat. 593, 594, a reservation was set up for the Cheyenne and Arapahoe Tribes. Since the area was not surveyed until September 16, 1872 (Fdg. VI, R. 61), the reservation was described by natural boundaries, and consisted of all lands south of the 37th parallel of north latitude which lay between the Cimarron and the Arkansas Rivers. These rivers formed the west and east boundaries and the grant was expressly extended to the middle of these rivers. This reservation included the riparian lands and abutting portions of the river bed now in question. The Cheyenne and Arapahoe Tribes declined this reservation and relinquished their claim. H. R. Ex. Doc. No. 89, 47th Cong., 1st sess. (Fdg. III (d), R. 58). However,

this action shows that, in executing the policy for which the United States acquired rights in these lands from the Cherokee Nation, the Government intended to include the river bed within the grant to the Indians to be settled on such lands.

The same intention was manifested when, on June 5, 1872 (again before any survey was available), the United States confirmed to the Osage Nation a tract of land "Bounded * * * on the south and west by the north line of the Creek Country and the main channel of the Arkansas River * * *." 17 Stat. 228–229. This grant included the land on the opposite side of the river at approximately the same point as is here involved (R. 62), and the title of the United States to the north half of the river bed, in trust for the Osage Nation, was upheld in litigation between the United States and Oklahoma. *United States* v. *Brewer-Elliott Oil & Gas Co.*, 249 Fed. 609 (W. D. Okla.), affirmed, 270 Fed. 100 (C. C. A. 8), affirmed, 260 U. S. 77. Thus in both instances prior to the availability of survey descriptions, the United States expressly included the bed of the Arkansas River.

The official survey was approved on September 16, 1872, and the subsequent dispositions and grants to the Pawnees and to the Otoes and Missourias were, as already shown (pp. 5–10, *supra*), by such survey descriptions, the riparian lands here involved being conveyed as parts of

fractional townships. It was a thoroughly natural practice to utilize the survey descriptions.[10] As a result no express mention of the river bed is contained in these subsequent executions of the broad settlement policy already outlined. It is submitted that these later grants should be construed in the light of the policy of the United States manifested in the earlier settlements at a time when natural boundaries had to be resorted to. There is no reason to suppose that the Government intended to deal less generously with the Pawnees and Otoes than it had previously dealt with the Cheyennes, the Arapahoes, and the Osages. On the contrary, it seems quite clear that, if resort to natural boundaries had been necessary in 1876 and 1881, when the grants to the Pawnees and Otoes were made, the Government would, as in the case of the Cheyennes and the Osages, have bounded the reservations by the main channel of the river.

It is accordingly submitted that the history, of which the grants to the Pawnees and the Otoes, and later the trust patents, were but parts, affirm-

[10] It is interesting to note that, while the Act of June 5, 1872, 17 Stat. 228–229, creating the Osage Reservation, expressly bounded it by the main channel of the Arkansas River, the deed from the Cherokee Nation to the United States, executed pursuant to that act and after the survey had been completed, did not make the main channel of the river the boundary, but described the lands as "fractional townships being on the left bank of the Arkansas River," *Brewer-Oil Co.* v. *United States*, 260 U. S. 77, 82.

atively shows an intent on the part of the Government to include the bed of the river in all these grants.

2. *The trust patents embraced the bed of the river under the local law in force in the Oklahoma Territory at the time the patents were issued.*— Even if the history preceding the issuance of the trust patents did not justify a finding of intent to include the river bed, such intent is ascertained when resort is had to the other rule of construction announced by this Court in *Oklahoma* v. *Texas*, 258 U. S. 574, 594–595—construction according to the local law. In that case, this Court stated that the grants will be construed according to the law of the State in which the land lies to determine whether the United States intended to dispose of the river bed or intended to retain it.

This Court there spoke in terms of the law of the State simply because the trust patents there in issue were granted after Oklahoma had become a State. Where, as here, the grants were made before the formation of a State, the law with reference to which the grant must be construed is the local law in force in the territory where the land is situated. *United States* v. *Elliott*, 131 F. 2d 720, 723 (C. C. A. 10). This is so because the theory of the rule is that the local law was in contemplation by the United States when it made the grants and that the Government assented to their construction according to that law.

It should be noted that this principle of construction is not based upon any sovereign right of the State or local government. Since the beds of nonnavigable streams are the property of the United States, it is for the United States alone to say whether it will grant them to riparian grantees of the Government or retain them. *United States* v. *Oregon*, 295 U. S. 1, 27–28. State or local law, as applied in construing such grants, accordingly does not operate as state law, but as adopted federal law. In the *Oregon* case (295 U. S. 1, 28) this Court stated:

> In construing a conveyance by the United States of land within a State, the settled and reasonable rule of construction of the State affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.

And if by local law the bed of a nonnavigable stream does not pass to the grantee of the shore land, it remains the property of the United States. (*Ibid*, p. 29).[11]

Accordingly, the Circuit Court of Appeals applied the local law in effect in the Oklahoma Ter-

[11] Petitioners argue (Br. 17–36), without citation of authority, that title to the river bed did not pass from the Cherokee Nation under the deeds in trust for the Pawnees and Otoes, but became public domain of the United States under the cession by the Cherokee Nation under the Agreement of December 19, 1891, 1 Kappler, *Indian Affairs, Laws and Treaties*, pp. 490–492. The argument is unsound. The language relied upon in both deeds clearly makes the river

ritory when these grants were made—that being the law in existence at that time which affords the "obvious guide" to the intention of the United States. The law in the Oklahoma Territory was embodied in Section 4173, St. 1890, enacted by the Territorial Legislature and reading, so far as here material, as follows:

> * * * In all cases, where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

This statute adopts the identical language of Section 6 of the Act of June 1, 1796, 1 Stat. 490–491, R. S. 2476, 43 U. S. C. 931, construed in *Railroad Company* v. *Schurmeir,* 7 Wall. 272, 287–289, as embodying the common law rule that a grant of shore land on a non-navigable stream carries title to the thread of the stream and in-

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the boundary, and both deeds were according to annexed plats which show the river as the boundary. Hence the thread of the river is the limit of the grant. *Railroad Company* v. *Schurmeir,* 7 Wall. 272, 287; *Hardin* v. *Jordan,* 140 U. S. 371, 379–380. Similarly recitations of the acreage of the shore land do not exclude the bed. *Railroad Company v. Schurmeir, supra;* cf. *United States* v. *Hayes,* 20 F. 2d 873 (C. C. A. 8); *Faulks* v. *Schrider et al.,* 99 F. 2d 370, 373 (App. D. C.). The matter need not be further pursued since it is irrelevant. Even if the Government held the bed as public domain at the time it issued the trust patents, rather than as tribal lands, this creates no title or other interest in the State. And the same local law is resorted to in construing the patents regardless of whether the Government was disposing of public land or tribal land. *Oklahoma* v. *Texas,* 258 U. S. 574, 594–595.

cludes the river bed. See also *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 86–87. Thus the allotment patents here in question, all of which were issued during the existence of Oklahoma Territory, carried title to the south half of the river bed adjacent to the shore lands covered by the patents, by reason of the local law.

While the law of Oklahoma as a State is irrelevant, since it cannot constitute a guide to the intention of the United States in making grants prior to the State's existence, it may be noted that the common-law rule applies also in Oklahoma. *Oklahoma* v. *Texas,* 258 U. S. 574, 596; *Hale* v. *Record,* 44 Okla. 803, 146 Pac. 587; *Anderson-Pritchard Oil Corp.* v. *Key Okla. Oil Co.,* 149 Okla. 262, 299 Pac. 850; *Hunzicker* v. *Kleeden,* 161 Okla. 102, 17 P. 2d 384. In *Oklahoma* v. *Texas, supra,* this Court held that trust patents issued in 1909 and 1910 embraced the bed of the Red River by reason of Oklahoma law. And if the law of Oklahoma had any bearing here, it follows that title to the river bed vested under the trust patents even under state law at least as early as 1909 and 1910, long before the erroneous decision in the *Nolegs* case or the 1919 statute relied upon by petitioners.

B. *Oklahoma could not retroactively appropriate the river bed, the beneficial interest thereto having already vested in the Indian allottees.*— It is elemental that Oklahoma upon its subsequent

admission as a State could not, by an erroneous judicial determination of navigability or by legislative fiat, divest the United States or its Indian wards of the title previously vested. *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 87; *United States* v. *Oregon,* 295 U. S. 1, 28, 29. In the *Brewer Oil* case, this Court, speaking of a grant prior to statehood, said (260 U. S. pp. 87–88):

> In such a case as this the navigability of the stream is not a local question for the state tribunals to settle. The question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made, and that was thirty-five years before Oklahoma was taken into the Union and before there were any local tribunals to decide any such questions. As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of

> the title. It is not for a State by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.

And in *United States* v. *Oregon*, 295 U. S. 1, 29, this Court referred to a state statute, similar to the 1919 Oklahoma statute relied upon here, as an "attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remained the property of the United States."

There is another barrier to the attempted appropriation by the State of the river bed. The Oklahoma Enabling Act, 34 Stat. 267, 270, sec. 3, provides:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation.

This provision of the Enabling Act is binding on the State. *Coyle* v. *Oklahoma*, 221 U. S. 559, 574; cf. *Ex Parte Webb*, 225 U. S. 663, 690–691; *United States* v. *Sandoval*, 231 U. S. 28, 38.

CONCLUSION

It is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent.

MOTION.

The State of Kansas believes that the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of United States v. Champlin Refining Company and State of Oklahoma, 156 F. (2d) 769, is contrary to the settled decisions of the Supreme Court of the United States and of the Supreme Court of Kansas. The State of Kansas further believes that such decisions would unjustly disturb the peaceable ownership and use of the beds of its public rivers which this state has enjoyed for many years by virtue of those decisions.

For the above reasons, the State of Kansas respectfully moves this Honorable Court that it be permitted to file the attached brief, amicus curiae, in support of the petition of the State of Oklahoma for writ of certiorari in this action.

A. B. MITCHELL,
Attorney General of the
State of Kansas.

SUPREME COURT OF THE UNITED STATES

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STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent.

BRIEF, AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The State of Kansas owns the beds of both the Arkansas and Kansas Rivers throughout their course within the State of Kansas by decisions of the Supreme Court of Kansas, holding that such rivers are navigable and that the beds thereof belong to the State. The principal decisions of the state court affecting the Kansas River are Wood v. Fowler, 26 Kan. 682, and State v. Akers, 92 Kan. 169. The principal state decision affecting the Arkansas River is Hurst v. Dana, 86 Kan. 947. The case of State v. Akers, supra, was appealed to the United States Supreme Court under the title of Wear v. Kansas, 245 U. S. 154, and was affirmed in all respects by that Court. It was again affirmed in Brewer-Elliott Oil and Gas Company v. United States, 260 U. S. 77.

The title of the State was contested in Wear v. Kansas by riparian owners of land on the bank of the Arkansas River. Their predecessors in title to a portion of these lands were Wyandotte Indians who, prior to Kansas statehood, had received Federal patents to such riparian lands.

As shown in the opinion in Wear v. Kansas, supra, the territorial legislature of Kansas had adopted the common law with reference to riparian ownership, and had declared the Kansas River to be non-navigable. These enactments of the territorial legislature, if enforceable, would have extended the title of the Indian allottees to the center of the stream at the time they received their patents.

The Supreme Court of the United States, however, speaking through Mr. Justice Holmes in Wear v. Kansas, held in effect that the territorial legislature was without power to fix riparian rights and that the determination of such rights was reserved for the State. The Court further held that the navigability of the river was a "question of state law" and that it was to be "established once for all, not perpetually retried."

The case of Wear v. Kansas has become a landmark not only on the special holding that, for the purpose of defining private titles a state may take judicial notice of the navigability of its rivers, but also as a forerunner of the doctrine of Erie v. Tompkins, 304 U. S. 64.

In one of his noted dissents, Mr. Justice Holmes in Black and White Taxi Cab and Tr. Co. v. Brown and Yellow Taxi Cab and Tr. Co., 276 U. S. 533, cited Wear v. Kansas in support of the doctrine which later became the basis of Erie v. Tompkins, his language being as follows:

> "The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally *but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else.* It may be adopted by statute in place of another system previously in force. Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 345, 53 L. ed. 822, 825, 29 Sup. Ct. Rep. 493. But a general adoption of it does not prevent the state courts from refusing to follow the English decisions upon a matter where the local conditions are different. Wear v. Kansas, 245 U. S. 154, 156, 157, 62 L. ed. 214, 218, 38 Sup. Ct. Rep. 55, Ann Cas. 1918B, 586. It may be changed by statute, Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 37 L. ed 772, 777, 13 Sup. Ct. Rep. 914, as is done every day. It may be departed from deliberately by judicial decisions, *as with regard to water rights*, in states where the common law generally prevails." (Emphasis will be ours throughout this brief unless otherwise noted.)

In Arizona v. California, 283 U. S. 452, this Court, speaking through Mr. Justice Brandeis, cited Wear v. Kansas as follows:

> "But a court may take judicial notice that a river within its jurisdiction is navigable. United States v. Rio Grande Dam & Irrig. Co., 174 U. S. 690, 697, 43 L. ed. 1136, 1139, 19 S. Ct. 770; Wear v. Kansas, 245 U. S. 154, 158, 62 L. ed. 214, 218, 38 S. Ct. 55, Ann. Cas. 1918B, 586."

The Federal Courts in Kansas have on two separate occasions followed the doctrine of Wear v. Kansas.

The title of the State of Kansas to the Arkansas River (the same river involved in the case at bar) was put in issue in Jackson-Walker Coal and Material Com-

pany v. Hodges (1918), 283 Fed. 457. In that case the United States District Court for the District of Kansas upheld the title of the State in the following language:

> "While, from a consideration of the proof taken and submitted in this case, and from that general knowledge common to all men, there can be no possible doubt whatever the Arkansas River at the point in controversy in this case is not now, and has not, since its known history, been navigable in point of fact; that is to say, the stream in its ordinary condition does not afford a channel for useful commerce, hence is not navigable within the meaning of acts of Congress on that subject as defined in the Montello, 20 Wall. 430, 22 L. ed 391; Leovy v. United States, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. ed. 914, United States v. Rio Grande Irrigation Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136; South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782; The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73, and many other cases. However, from what has gone before, it must, I think, be held, in this case, the navigability of the stream in point of fact is not the true test. On the contrary, the true test is whether the Arkansas River at the locus in quo must be regarded as navigable under the local laws of the State of Kansas, as ordained and established for the purpose of the unvarying determination of the property rights of riparian owners along its course through the state. *That by the local property rule established in this state, once for all, the title to the bed of the Arkansas River within the state is vested in the state and not in the adjoining riparian owner.*"

The above case was cited with approval by the Circuit Court of Appeals for the 8th Circuit in United States v. Holt State Bank, 294 Fed. 165, (affirmed by

the Supreme Court of the United States in 270 U. S. 55) in the following language:

> "Moreover, since the settled law has become that the rights and interests of riparian owners on the shores of lakes and rivers to the lands under the waters upon which they border are determinable by the law of the state in which the lands lie, and since such rights and interests are often conditioned by the navigability of such waters, it logically follows, and has long since become the law of the land, with some exceptions not material in the consideration of this case (Brewer-Elliott Oil & Gas Co. v. United States, (C. C. A.) 270 Fed. 100, 107, 109), that in the determination of the rights of riparian owners to the lands under the water upon which their lands border, *what shall be deemed a navigable water must be determined by the law of the state in which the riparian lands lie.* (Donnelly v. United States, 228 U. S. 243, 262, 33 Sup. Ct. 449, 57 L. ed. 820, Ann. Cas. 1913E. 710; Jackson-Walker Coal & Material Co. v. Hodges, (D. C.) 283 Fed. 457, 462.)"

The title of the State to the Arkansas River bed was again in issue in Shore v. Shell Petroleum Corporation (1931), 55 F. (2nd.) 696. In that case it was contended that the Osage Indians had received an express grant of the river bed and that the case was therefore governed by the exception to the established rule as applied in Brewer-Elliott Oil and Gas Company v. United States, 260 U. S. 77.

The United States District Court held, however, that the Osages had relinquished their title and again upheld the title of the State in the following language:

> "The difficulty with the argument is that the Indians did not own the fee title, that plaintiffs did not deraign their title from the Indians, *and that the question of navigability in fact is not the true test*

> *with which we are confronted.* It appears to be well settled that where the litigation over the property rights *is between private parties, the local law regarding navigability controls,* and so the question here is, not whether the Arkansas River in Kansas was navigable in fact prior to the issuance of the patents to the riparian owners, but whether under the law and public policy of the state it was deemed to be navigable."

This decision was affirmed by the United States Circuit Court of Appeals for the 10th Circuit, 60 F. (2d) 1, in which opinion the Court said:

> "In Wear v. Kansas, 245 U. S. 154, 38 S. Ct. 55, 62 L. ed. 214, Ann. Cas. 1918B, 586, it was held that, if a state court takes upon itself to know without evidence whether a river is navigable, a Federal court cannot say it erred. And in Donnelly v. United States, 228 U. S. 243, 262, 33 S. Ct. 449, 455, 57 L. ed. 820, Ann. Cas. 1913E, 710, the court said:
>
> > 'But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several state.'
>
> "See, also, Jackson-Walker Coal & Material Co. v. Hodge (D. C.) 283 F. 457. So we apply in this case the rule of property established by the Supreme Court of Kansas."

The title of the State had been earlier contested in Kansas v. Colorado, 206 U. S. 46. Justice Brewer stated, however, that each State had full jurisdiction over the lands within its borders, including the beds of streams.

On the basis of the above decisions, the State of Kansas has exercised complete ownership of the beds of the Arkansas and Kansas Rivers for a great many years.

Oil has been discovered in several fields along and in the Arkansas River, and the State has issued many oil and gas leases covering the river bed. The rentals and royalties derived from these leases have at all times been collected by the State for the benefit of the public, and its right and title to the river bed and to the income therefrom has never been successfully put in question since the decision of the Supreme Court of the United States in Wear v. Kansas, supra. In many other ways the beds of these rivers are extremely valuable to the public, and the State of Kansas most earnestly believes that its title thereto is settled and is immune from the claims of any persons whomsoever.

The decision of the Circuit Court of Appeals in the present case, however, rejected a similar rule of navigability of the State of Oklahoma and placed in its stead a finding of non-navigability-in-fact made by a United States District Court more than thirty-five years after the issuance of the patents there under consideration.

The Circuit Court attempted to draw a distinction that in the Oklahoma case the patents were issued before statehood and that the riparian rights attaching to the patents were governed by the law of the Territory of Oklahoma.

The State of Kansas objects seriously to this holding. It would mean in our state, for example, that owners of lands along the Kansas or Arkansas Rivers, whose patents happen to have been issued prior to statehood, may now file suits in the Federal Courts, using the Circuit Court's opinion to claim the state's title. The riparian owners of lands adjoining the land in controversy in Wear v. Kansas would thus be governed by a different rule of ownership than were the riparian owners in Wear v. Kansas, and the same would be true of all

land along the river, except only those whose rights were adjudicated in that noted case.

The confusion of titles which would result would be entirely unwarranted, as the effect of the territorial law has been settled by this Court in Wear v. Kansas, supra. In that case, as stated above, the patents in question were issued prior to statehood but this Court held that the territorial law did not govern the riparian rights attaching to the patents.

This holding was in accordance with an earlier decision of this Court in Kansas v. Colorado, 206 U. S. 49. In that case it was contended that laws of the Territory of Colorado fastened the common law principle of equal use of flowing streams upon that state, and gave its citizens vested rights to demand the continuation of such principle. This Court rejected such contention, however, and held that the laws of the state which was later formed govern such rights and that the State of Colorado had power to adopt the opposite rule of prior appropriation. The Court said:

> "In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into states. (Citations) But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states (Citations), and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation."

It therefore appears to the State of Kansas that the decision of the Circuit Court of Appeals in the case at bar, is directly contrary to the holding of the United States Supreme Court in Wear v. Kansas, supra, as well

as to the doctrine of Erie v. Tompkins, 304 U. S. 64. It also appears that such decision would encourage riparian owners along the banks of the Arkansas and Kansas Rivers in this State to bring a multitude of suits in the Federal Court, in the belief that they can wrest the title to the beds of those rivers from the State by merely obtaining findings of non-navigability in fact, from such Courts. The confusion of titles which would necessarily result from such litigation would not only be contrary to the settled doctrines of this Court but would also impair the sovereignty of the State of Kansas over the beds of its public streams which has been recognized, by repeated decisions of this Court, to be the prerogative of all States of the Union.

For the above reasons it is respectfully stated that it appears to the State of Kansas that the decision of the Circuit Court of Appeals for the Tenth Circuit in this action should be reviewed by this Honorable Court and that upon such review the decision should be reversed.

A. B. MITCHELL,
Attorney General of the
State of Kansas,
Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent.

MOTION.

The State of Kansas believes that the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of United States v. Champlin Refining Company and State of Oklahoma, 156 F. (2d) 769, is contrary to the settled decisions of the Supreme Court of the United States and of the Supreme Court of Kansas. The State of Kansas further believes that such decisions would unjustly disturb the peaceable ownership and use of the beds of its public rivers which this state has enjoyed for many years by virtue of those decisions.

For the above reasons, the State of Kansas respectfully moves this Honorable Court that it be permitted to file the attached brief, amicus curiae, in this action.

EDWARD F. ARN,
Attorney General of the
State of Kansas.

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, Petitioners,

vs.

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BRIEF, AMICUS CURIAE, OF THE STATE OF KANSAS.

The State of Kansas owns the beds of both the Arkansas and Kansas Rivers throughout their course within the State of Kansas by decisions of the Supreme Court of Kansas, holding that such rivers are navigable and that the beds thereof belong to the State. The principal decisions of the state court affecting the Kansas River are Wood v. Fowler, 26 Kan. 682, and State v. Akers, 92 Kan. 169. The principal state decision affecting the Arkansas River is Hurst v. Dana, 86 Kan. 947. The case of State v. Akers, supra, was appealed to the United States Supreme Court under the title of Wear v. Kansas, 245 U. S. 154, and was affirmed in all respects by that Court. It was again affirmed in Brewer-Elliott Oil and Gas Company v. United States, 260 U. S. 77.

The title of the State was contested in Wear v. Kansas by riparian owners of land on the bank of the Arkansas River. Their predecessors in title to a portion of these lands were Wyandotte Indians who, prior to Kansas statehood, had received Federal patents to such riparian lands.

As shown in the opinion in Wear v. Kansas, supra, the territorial legislature of Kansas had adopted the common law with reference to riparian ownership, and had declared the Kansas River to be non-navigable. These enactments of the territorial legislature, if enforceable, would have extended the title of the Indian allottees to the center of the stream at the time they received their patents.

The Supreme Court of the United States, however, speaking through Mr. Justice Holmes in Wear v. Kansas, held in effect that the territorial legislature was without power to fix riparian rights and that the determination of such rights was reserved for the State. The Court further held that the navigability of the river was a "question of state law" and that it was to be "established once for all, not perpetually retried."

The case of Wear v. Kansas has become a landmark not only on the special holding that, for the purpose of defining private titles a state may take judicial notice of the navigability of its rivers, but also as a forerunner of the doctrine of Erie v. Tompkins, 304 U. S. 64.

In one of his noted dissents, Mr. Justice Holmes in Black and White Taxi Cab and Tr. Co. v. Brown and Yellow Taxi Cab and Tr. Co., 276 U. S. 533, cited Wear v. Kansas in support of the doctrine which later became the basis of Erie v. Tompkins, his language being as follows:

> "The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally *but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else.* It may be adopted by statute in place of another system previously in force. Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 345, 53 L. ed. 822, 825, 29 Sup. Ct. Rep. 493. But a general adoption of it does not prevent the state courts from refusing to follow the English decisions upon a matter where the local conditions are different. Wear v. Kansas, 245 U. S. 154, 156, 157, 62 L. ed. 214, 218, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586. It may be changed by statute. Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 37 L. ed. 772, 777, 13 Sup. Ct. Rep. 914, as is done every day. It may be departed from deliberately by judicial decisions, *as with regard to water rights*, in states where the common law generally prevails." (Emphasis will be ours throughout this brief unless otherwise noted.)

In Arizona v. California, 283 U. S. 452, this Court, speaking through Mr. Justice Brandeis, cited Wear v. Kansas as follows:

> "But a court may take judicial notice that a river within its jurisdiction is navigable. United States v. Rio Grande Dam & Irrig. Co., 174 U. S. 690, 697, 43 L. ed. 1136, 1139, 19 S. Ct. 770; Wear v. Kansas, 245 U. S. 154, 158, 62 L. ed. 214, 218, 38 S. Ct. 55, Ann. Cas. 1918B, 586."

The Federal Courts in Kansas have on two separate occasions followed the doctrine of Wear v. Kansas.

The title of the State of Kansas to the Arkansas River (the same river involved in the case at bar) was put in issue in Jackson-Walker Coal and Material Com-

pany v. Hodges (1918), 283 Fed. 457. In that case the United States District Court for the District of Kansas upheld the title of the State in the following language:

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This decision was affirmed by the United States Circuit Court of Appeals for the 10th Circuit, 60 F. (2d) 1. in which opinion the Court said:

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On the basis of the above decisions, the State of Kansas has exercised complete ownership of the beds of the Arkansas and Kansas Rivers for a great many years.

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The decision of the Circuit Court of Appeals in the present case, however, rejected a similar rule of navigability of the State of Oklahoma and placed in its stead a finding of non-navigability-in-fact made by a United States District Court more than thirty-five years after the issuance of the patents there under consideration.

The Circuit Court attempted to draw a distinction that in the Oklahoma case the patents were issued before statehood and that the riparian rights attaching to the patents were governed by the law of the Territory of Oklahoma.

The State of Kansas objects seriously to this holding. It would mean in our state, for example, that owners of lands along the Kansas or Arkansas Rivers, whose patents happen to have been issued prior to statehood, may now file suits in the Federal Courts, using the Circuit Court's opinion to claim the state's title. The riparian owners of lands adjoining the land in controversy in Wear v. Kansas would thus be governed by a different rule of ownership than were the riparian owners in Wear v. Kansas, and the same would be true of all

land along the river, except only those whose rights were adjudicated in that noted case.

The confusion of titles which would result would be entirely unwarranted, as the territorial law has been held to be of no effect in Wear v. Kansas, supra. In that case, as stated above, the patents in question were issued prior to statehood but this Court held that the territorial law did not govern the riparian rights attaching to the patents.

This holding was in accordance with an earlier decision of this Court in Kansas v. Colorado, 206 U. S. 49. In that case it was contended that laws of the Territory of Colorado fastened the common law principle of equal use of flowing streams upon that state, and gave its citizens vested rights to demand the continuation of such principle. This Court rejected such contention, however, and held that the laws of the state which was later formed govern such rights and that the State of Colorado had power to adopt the opposite rule of prior appropriation. The Court said:

> "In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into states. (Citations) But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states (Citations), and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation."

It therefore appears to the State of Kansas that the decision of the Circuit Court of Appeals in the case at bar, is directly contrary to the holding of the United States Supreme Court in Wear v. Kansas, supra, as well

as to the doctrine of Erie v. Tompkins, 304 U. S. 64. It also appears that such decision would encourage riparian owners along the banks of the Arkansas and Kansas Rivers in this State to bring a multitude of suits in the Federal Court, in the belief that they can wrest the title to the beds of those rivers from the State by merely obtaining findings of non-navigability in fact, from such Courts. The confusion of titles which would necessarily result from such litigation would not only be contrary to the settled doctrines of this Court but would also impair the sovereignty of the State of Kansas over the beds of its public streams which has been recognized, by repeated decisions of this Court, to be the prerogative of all States of the Union.

For the above reasons it is respectfully stated that it appears to the State of Kansas that the decision of the Circuit Court of Appeals, for the Tenth Circuit in this action should by this Honorable Court, be reversed.

EDWARD F. ARN,
Attorney General of the
State of Kansas,
Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES,
October Term, 1946.

No. 715.

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA.

PETITION *for* REHEARING.

Comes now the State of Oklahoma and the Champlin Refining Company, petitioners, complaining of the judgment of this Court in the above entitled action and ask for a rehearing, on grounds as follows:

I.

Neither this Court nor the Circuit Court of Appeals noticed the principal feature of petitioners' evidence, to-wit, that the State of Kansas, by a decision of this Court,[1] has been awarded title to the *entire* beds of both the Kansas and Arkansas Rivers, *regardless of the fact that both rivers are actually non-navigable and regardless as to whether the riparian patents were issued before statehood*

1. Wear v. Kansas, 245 U. S. 154.

or after. Nor did either court decide petitioners' contention based on such evidence, to-wit, that the doctrine of equality of sovereign states under the Constitution requires that Oklahoma be accorded the same rights of ownership with respect to the bed of the Arkansas River as have been granted to her sister state.

It is useless to indulge in fine distinctions in language. The plain fact is that Kansas owns and is exercising dominion and control over the *entire* beds of both the Kansas and Arkansas Rivers and that the state is receiving all of the fruits of such ownership for the benefit of its whole people. We are faced in this case "with a condition and not a theory."

Yet, when the State of Oklahoma asks that identical ownership be approved for its people and raises in this case the most sacred issue which can be invoked by either states or individuals, *viz.*, that of equality under the Constitution, such appeal goes unremarked by this Court.

The decisions in *Brewer-Elliott Oil and Gas Company* v. *United States*[2] and *Oklahoma* v. *Texas*,[3] cited by this Court, merely hold that the Congress had authority, prior to Oklahoma statehood, to sell and dispose of portions of the rivers of Oklahoma by means of treaties with Indian tribes. The court, in both of these cases, however, took pains to reaffirm the general rule, that the *state law governs* in the construction of patents *which do not expressly cover the river bed,* and made it plain that were it not for the *express conveyances* of the segments of river beds involved in those cases, the ownership of the state would have been upheld. Nothing could be more obvious or certain.

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2. 260 U. S. 77.
3. 258 U. S. 574.

The portion of the river bed involved in the present case was never conveyed to any Indian Tribe nor to any other person; therefore, when the petitioners raise the issue of equality between the States of Oklahoma and Kansas, the relevancy of cases which merely upheld the right of Congress to make conveyances of river beds prior to statehood, is not clear.

In *Wear* v. *Kansas*,[4] this Court "once and for all" awarded the bed of the Kansas River to the State of Kansas, regardless of the fact that the river was concededly non-navigable in fact and regardless of the circumtances that the riparian patents involved were issued prior to statehood.

In *Shore* v. *Shell Petroleum Corporation*,[5] the Circuit Court of Appeals relied upon *Wear* v. *Kansas*, and approved a decision of the United States District Court which had adopted the "unvarying" rule that the bed of the Arkansas River belongs to the State of Kansas. This Court denied *certiorari*.[6]

In the present case, however, this Court and the Circuit Court of Appeals have declined to apply the law of Oklahoma that the bed of the Arkansas River (excepting those portions expressly conveyed to Indian tribes before statehood) belongs to the State of Oklahoma. On the contrary, distinctions in procedure have been drawn, which result in the condition that the particular segments of the river bed involved in this action have been held to belong to private riparian owners whereas the entire bed of the same river in Kansas has been held to belong to the public.

When the State of Oklahoma has earnestly sought in

4. 245 U. S. 154.
5. 60 F. (2d), p. 1.
6. 287 U. S. 656.

this Court an answer to the question as to why such an unequal condition should exist between two sovereign states, this Court has remained silent. Because of this silence, Oklahoma is concerned and aggrieved at the lack of an answer.

II.

Since this Court affirmed the decision of the Circuit Court of Appeals without opinion, it must be deemed to have adopted the reasoning of the Circuit Court opinion.

That opinion rests upon the fact that the riparian patents in the case at bar had been issued prior to statehood. However, since the Circuit Court of Appeals has upheld the right of the State of Kansas to assert title to the Arkansas River bed in a case[7] in which the riparian patents were issued after statehood, it must be assumed that the same treatment would be accorded Oklahoma and that the segments of the Arkansas River adjoining riparian lots patented after statehood, will likewise be held to belong to our state. This being true, it is obvious from the affirmance entered in the present case, that this Court no longer believes that the title to a river bed under similar circumstances, should be decided once and for all. On the contrary, the title to each segment of the river bed must be determined upon the facts of each particular case. Any interpretation other than the one just stated would lead to the incredible result that the river beds in Kansas are awarded to that state in their entirety, *regardless of the facts,* whereas the State of Oklahoma is denied title to its river beds in their entirety, *regardless of the facts.*

Since, therefore, the title to each segment of river bed is to be decided anew in each particular case, the facts in

7. Shore v. Shell Petroleum Corporation, 60 F. (2d), p. 1.

the cases now before the Supreme Court of Oklahoma[8] would require a decision for the state, under the very opinion of the Circuit Court of Appeals which has been adopted by this Court in the present action.

This circumstance was called to the attention of this Court in petitioners' main brief at pages 15 and 16 thereof, and is obvious for the following reasons which we repeat.

The Circuit Court of Appeals first advanced the proposition that since the riparian patents in the case at bar were issued prior to statehood, they are to be governed by the common law in effect in Oklahoma territory. That court, however, recognized that in *Wear* v. *Kansas* the patents *had also been issued prior to statehood,* that the state rule of navigability was held to govern such patents, none-the-less, and that under such law the riparian owners were held to have no title to the bed.

The Circuit Court of Appeals did not overrule *Wear* v. *Kansas,* but distinguished the case at bar from that case, because of two unique facts in the present action, to-wit, (*1*) the Oklahoma Supreme Court had not adopted its rule of navigability for the Arkansas River in a case in which the Indian riparian owners in the present action were parties, and, (*2*) the trial court in the case at bar made a finding of fact that the Arkansas River is non-navigable. The Circuit Court of Appeals therefore concluded that the finding of the trial court that the Arkansas River was non-navigable is the law of the present case, *because the rule of the Oklahoma Supreme Court to the effect that the Arkansas River is navigable in law was not binding upon the Indian riparian owners, who were not parties to any case in which the state rule had been promulgated.*

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8. Aladdin Petroleum Corporation v. State of Oklahoma, No. 32625; L. D. Oldham v. State of Oklahoma, No. 32629.

Since the law of *Wear* v. *Kansas* still stands and since the present case has turned on the procedural distinctions above noted, it is exceedingly important to note that the procedure in the cases now before the Oklahoma Supreme Court is identical with the procedure in *Wear* v. *Kansas,* and that the distinctions found by the Circuit Court of Appeals *do not exist in the state cases,* now pending.

In the state cases, the trial court did not make a finding that the Arkansas River is non-navigable in fact, but on the contrary overruled a request by the riparian owners that such finding be made, *and found, without more, that the Arkansas River is navigable under the laws of Oklahoma.*[9] This rule of navigability, if affirmed by the Oklahoma Supreme Court, will be binding upon the riparian owners in the state cases, *because it was made in a case in which those riparian owners were parties.*

Since the procedure in the cases before the State Court is identical with the procedure approved by the United States Supreme Court in *Wear* v. *Kansas,* the Supreme Court of Oklahoma could not decide for the riparian owners in the cases before it, unless it expressly overrules the doctrine of the United States Supreme Court in *Wear* v. *Kansas*—a thing which this Court has offtimes declined to do.

It must be assumed, therefore, that the law applicable to the cases now before the Oklahoma Supreme Court is the rule of *Wear* v. *Kansas* and that the riparian owners in the state cases must be denied title as in the Kansas case.

The petitioners are appreciative that under the deci-

9. Record, Supreme Court of Oklahoma, Aladdin Petr. Corp., et al., v. State of Oklahoma, et al., No. 32625, pp. 225, 245, 246; L. D. Oldham, et al., v. State of Oklahoma, et al., No. 32629, pp. 246, 266, 267.

sion of the Circuit Court of Appeals, as affirmed by this Court, there is still left to the Supreme Court of Oklahoma the authority, in its discretion, to preserve for the State of Oklahoma title to the remaining segments of the Arkansas River bed.

However, the petitioners are still of the firm opinion that Oklahoma like Kansas is entitled to its *entire* river beds, excepting only those portions expressly conveyed by Congress to Indian Tribes prior to statehood; and for such reasons request a rehearing in order that the doctrine of equality of states may be re-affirmed by this Court.

Respectfully submitted,

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Mac Q. Williamson, as counsel for petitioners herein, does hereby certify that the within and foregoing Petition for Rehearing is presented in good faith and not for delay.

.....,
MAC Q. WILLIAMSON.

No. 715. OKLAHOMA ET AL. *v.* UNITED STATES. Certiorari, 329 U. S. 711, to the Circuit Court of Appeals for

the Tenth Circuit. Argued April 28, 29, 1947. Decided May 19, 1947. *Per Curiam:* The judgment is affirmed. *Oklahoma* v. *Texas*, 258 U. S. 574; *Brewer Oil Co.* v. *United States*, 260 U. S. 77. *Mac Q. Williamson*, Attorney General, argued the cause for the State of Oklahoma, and *Nathan Scarritt* argued the cause for the Champlin Refining Company, petitioners. With them on the brief were *Harry O. Glasser* and *E. S. Champlin*. *Stanley M. Silverberg* argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Bazelon, Roger P. Marquis* and *Fred W. Smith*. *Edward F. Arn*, Attorney General of Kansas, filed a brief for that State, as *amicus curiae*, urging reversal. Reported below: 156 F. 2d 769.